No. 11322

25,2445

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Trustee,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

FILED
JUL 29 1946
PAUL P. O'BRIEN,
CLERK

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11322

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Trustee,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 661 Howard Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer 86

Amended Answer 93

Appeal:

Certificate of Clerk to Transcript of Record on 184

Designation of Record 180

Notice of 177

Plaintiff's Addition to Designation of Record on 181

Statement of Points to be Relied on by Defendant on 178

Certificate of Clerk to Transcript of Record on Appeal 184

Complaint for Recovery of Taxes Illegally Assessed and Collected 2

Designation of Record on Appeal (DC) 180

Findings of Fact and Conclusions of Law 172

Judgment for Refund of Taxes 175

Names and Addresses of Attorneys 1

Notice of Appeal 177

Notice of Entry of Judgment 176

Notice of Judgment 171

Order Extending Time for Filing Record on Appeal and Docketing the Action (DC)..... 178

Order Extending Time for Filing Records and Docketing Cause, dated April 15, 1946 (CCA) 182

Order Extending Time for Filing Record and Docketing Cause, dated May 15, 1946 (CCA) 183

Statement of Points to be Relied on by Defendant on Appeal 178

Stipulation of Facts 95

Transcript of Testimony 156

Witnesses for Plaintiff:

Henderliter, R. C.

—direct 160

—cross 167

Weill, Lawrence I.

—direct 168

NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY, Esq.,

United States Attorney,

Northern District of California,

Post Office Building,

7th and Mission Streets,

San Francisco, California,

Attorney for Defendant and Appellant.

LLOYD G. RAINEY, Esq.,

PAUL C. JONES, Esq.,

810 South Spring Street,

Los Angeles, California,

Attorneys for Plaintiff and Appellee.

In the District Court of the United States
Northern District of California
Southern Division

No. 23580-R

HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, TRUSTEE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF TAXES ILLEGALLY ASSESSED AND COLLECTED

Comes Now the plaintiff and complains of defendant and for cause of action alleges:

I.

That Bank of America National Trust and Savings Association above named at all times mentioned was a national banking association, duly organized and existing under the laws of the United States, with its principal office located in the City and County of San Francisco, State of California, and in the Northern District of California, Southern Division.

That plaintiff has at all times borne true allegiance to the government of the United States of America, and has not in any way voluntarily aided, abetted or given encouragement to a rebellion

against said government, nor at any time aided or abetted in [1*] any manner or given comfort to any sovereign or government that is, or ever has been, at war with said United States.

II.

That on or about the 28th day of January, 1926, in the City of Bakersfield, County of Kern, State of California, Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague, and Elizabeth S. Smith, as Trustors, entered into a trust agreement with the Security Trust Company, a California corporation, as Trustee, and conveyed certain real property to said Trustee, and that on or about the 23rd day of June, 1937, said individuals executed a supplemental agreement. That copies of said trust agreement and supplemental agreement, a part of Exhibit A attached to this complaint, are hereby referred to, and made a part hereof. That Security Trust Company was succeeded in interest as Trustee of said trust on or about the 23rd day of June, 1937, by the above-named Bank of America National Trust and Savings Association, and the latter ever since has been, and still is, the duly constituted and acting Trustee of said trust and the real party in interest in this action.

III.

That at all times herein mentioned the above-

* Page numbering appearing at foot of page of original certified Transcript of Record.

named defendant was, and now is, a sovereign body politic, by whom, through its agents, the taxes for which refund is here claimed were erroneously and illegally assessed and collected.

IV.

That plaintiff seeks to recover from defendant the sum of $2,059.50, together with interest thereon as provided by law from the dates of payment thereof; said sum being the amount of income and excess profits taxes for the taxable year ending December 31, 1938, to-wit, $2,055.25, together with interest in the amount of $4.25, erroneously and illegally assessed and collected [2] from plaintiff by defendant.

V.

That on or about the 17th day of February, 1939, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed income and excess profits tax return for the taxable year ending December 31, 1938, on Form 1120A issued by the Treasury Department of the United States. That said return disclosed a tax liability for said taxable year in the amount of $2,000.94. That said tax was duly paid on or about the 17th day of February, 1939, in the manner provided by law. That thereafter a deficiency assessment of income tax for said taxable year was made against plaintiff in the amount of $54.31, which said deficiency assessment, together with interest in the amount of $4.25, was paid by

plaintiff to defendant on or about the 8th day of July, 1940. That the total amount paid by plaintiff to defendant as income and excess profits taxes for said taxable year and interest thereon, as aforesaid, was the sum of $2,059.50.

VI.

That said sum paid by plaintiff as income and excess profits taxes and interest thereon was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as taxes, or otherwise, or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges:

VII.

That the beneficiaries under the trust evidenced by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property, and were not an association within the intent and meaning of Section 901 (a) (2) of the Revenue Act of 1938. [3]

VIII.

That the said trust agreement executed under date of January 28, 1926, was executed to secure the repayment to the Trustee of a loan in the sum of $14,000.00 made concurrently with the execution of said trust agreement; that the said trust was not possessed of features which would make it analogous to a corporation, in that the said trust agreements made no provision for the appointment of

successor Trustees to insure the continuity of the trust; the trust had no name as an entity; there were no officers of the trust, except as the managers appointed under the provisions thereof might be so considered; and they did not organize; there were no provisions for taking in additional capital or members; the trust agreements provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest; the trust agreements expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens and encumbrances against the property covered by the trust agreements, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property, or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust, or their beneficial interests in the trust; the beneficiaries were the equitable owners of the real property conveyed in trust to the Trustee and their beneficial interests were not merely personal claims; the trust agreement provided for the revocation of the trust upon the repayment of all loans and other money due said Trustee, and in such event the Trustee was required to convey and deliver to the then beneficiaries under the trust, as their interests might appear, the title to all of the real property then vested in the Trustee; the Trustee under the said

trust agreements held title to the property conveyed thereby [4] for the protection of its loans and was powerless to act other than upon the direction of the Board of Managers appointed pursuant to the provisions of the said trust agreements.

IX.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of income and excess profits taxes in the amount of $2,059.50, or such greater amount as may be legally refundable, for said taxable year ending December 31, 1938, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit A, referred to, and by this reference made a part hereof. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated August 10, 1942, a copy of which said notice is hereto attached, marked Exhibit H, referred to, and by this reference made a part hereof.

X.

That no part of said sum of $2,059.50 erroneously and illegally collected from plaintiff by defendant as aforesaid as income and excess profits taxes, and

interest thereon, has been repaid or refunded to plaintiff, and said sum of $2,059.50, together with interest from the dates of payment, is due, unpaid and owing from defendant to plaintiff.

XI.

That plaintiff is the sole and absolute owner of the claim here sued upon, and has made no transfer or assignment of the same, or any part thereof, or of any interest therein. No action upon said claim here sued upon has been taken before Congress, [5] or other of the departments of said government or any court other than the complaint filed in this court, and there are no just or other offsets to or against said claim.

SECOND CAUSE OF ACTION

For another, further and second cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of Paragraphs I, II, III, VIII and XI of the first cause of action herein, and makes the same a part of this second cause of action, the same as if fully set forth herein.

II.

That plaintiff seeks to recover from defendant the sum of $1,856.54, together with interest thereon as provided by law from the date of payment thereof; said sum being the amount of income and excess profits taxes for the taxable year ending De-

cember 31, 1939, erroneously and illegally assessed and collected from plaintiff by defendant.

III.

That on or about the 21st day of February, 1940, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed income and excess profits tax return for the taxable year ending December 31, 1939, on Form 1120A issued by the Treasury Department of the United States. That said return disclosed a tax liability for said taxable year in the amount of $1,894.14. That said tax was duly paid on or about the 21st day of February, 1940, in the manner provided by law. That thereafter an overassessment of income tax for said taxable year was made against said plaintiff in the amount of $37.60. That the total amount paid by plaintiff to defendant as income and excess profits taxes for said taxable year, as aforesaid, was the sum of $1,856.54. [6]

IV.

That said sum paid by plaintiff as income and excess profits taxes was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as taxes, or otherwise, or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges:

V.

That the beneficiaries under the trust evidenced

by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property, and were not an association within the intent and meaning of Section 3797 (a) (3) of the Internal Revenue Code.

VI.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of income and excess profits taxes in the amount of $1,856.54, or such greater amount as may be legally refundable, for said taxable year ending December 31, 1939, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit B, referred to, and by this reference made a part hereof. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated August 10, 1942, a copy of which said notice is hereto attached, marked Exhibit H. referred to, and by this reference made a part hereof. [7]

VII.

That no part of said sum of $1,856.54 erroneosuly and illegally collected from plaintiff by defendant

as aforesaid as income and excess profits taxes has been repaid or refunded to plaintiff, and said sum of $1,856.54, together with interest from the date of payment, is due, unpaid and owing from defendant to plaintiff.

THIRD CAUSE OF ACTION

For another, further and third cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of Paragraphs I, II, III, VIII and XI of the first cause of action herein, and makes the same a part of this third cause of action, the same as if fully set forth herein.

II.

That plaintiff seeks to recover from defendant the sum of $1,147.43, together with interest thereon as provided by law from the date of payment thereof; said sum being the amount of income and defense taxes for the taxable year ending December, 31, 1940, erroneously and illegally assessed and collected from plaintiff by defendant.

III.

That on or about the 12th day of March, 1941, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed income, declared value excess profits and defense tax return for the taxable year ending December 31, 1940, on

Form 1120 issued by the Treasury Department of the United States. That said return disclosed a tax liability for said taxable year in the amount of $1,147.43. That said tax was duly paid on or about the 12th day of March, 1941, in the manner provided by law. That thereafter an over-assessment of income tax for said taxable year was made against plaintiff in the amount of $53.45, which said overassessment, together with interest thereon, remains unpaid. That the total amount paid by plaintiff to defendant as income and defense taxes for said taxable year was the sum of $1,147.43.

IV.

That said sum paid by plaintiff as income and defense taxes was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as taxes, or otherwise, or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges:

V.

That the beneficiaries under the trust evidenced by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property and were not an association within the intent and meaning of Section 3797 (a) (3) of the Internal Revenue Code.

VI.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commis-

sioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of income, excess profits and defense taxes in the amount of $1,147.43, or such greater amount as may be legally refundable, for said taxable year ending December 31, 1940, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit C, referred to, and by this reference made a part hereof. That plaintiff's claim for refund was thereafter rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue [9] dated October 1, 1942, a copy of which said notice is hereto attached, marked Exhibit I, referred to, and by this reference made a part hereof.

VII.

That no part of said sum of $1.147.43 erroneously and illegally collected from plaintiff by defendant as aforesaid as income and defense taxes has been repaid or refunded to plaintiff and said sum of $1,147.43, together with interest from the date of payment, is due, unpaid and owing from defendant to plaintiff.

FOURTH CAUSE OF ACTION

For another, further and fourth cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of Paragraphs I, II, III, VIII and XI of the first cause of action herein, and makes the same a part of this fourth cause of action, the same as if fully set forth herein.

II.

That plaintiff seeks to recover from defendant the sum of $50.00, together with interest thereon as provided by law from the date of payment thereof; said sum being the amount of capital stock tax for the taxable year ending June 30, 1938, erroneously and illegally assessed and collected from plaintiff by defendant.

III.

That on or about the 26th day of July, 1938, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1938, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $50,000.00 was declared in accordance with the provisions of law, and the tax of $50.00 based upon said declared value was duly paid on or about the 26th day [10] of July, 1938, in the manner provided by law, by plaintiff to defendant.

IV.

That said sum paid by plaintiff as capital stock tax was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as a tax, or otherwise, or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges:

V.

That the beneficiaries under the trust evidenced by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property, and were not an association within the intent and meaning of Section 1001 (a) (2) of the Revenue Act of 1936.

VI.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $50.00, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1938, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit D, referred to, and by this reference made a part hereof.

That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a copy of which said notice is hereto attached, marked Exhibit J, referred to, and by this reference made a part hereof. [11]

VII.

That no part of said sum of $50.00 erroneously and illegally collected from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff, and said sum of $50.00, together with interest from the date of payment, is due, unpaid and owing from defendant to plaintiff.

FIFTH CAUSE OF ACTION

For another, further and fifth cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of Paragraphs I, II, III, VIII and XI of the first cause of action herein, and makes the same a part of this fifth cause of action, the same as if fully set forth herein.

II.

That plaintiff seeks to recover from defendant the sum of $75.00, together with interest thereon as provided by law from the date of payment thereof; said sum being the amount of capital stock tax for the taxable year end June 30, 1939, erroneously and illegally assessed and collected from plaintiff by defendant.

III.

That on or about the 18th day of August, 1939, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1939, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $75,000.00 was declared in accordance with the provisions of law, and the tax of $75.00 based upon said declared value was duly paid on or about the 18th day of August, 1939, in the manner provided by law, by plaintiff to defendant. [12]

IV.

That said sum paid by plaintiff as capital stock tax was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as a tax, or otherwise, or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges:

V.

That the beneficiaries under the trust evidenced by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property, and were not an association within the intent and meaning of Section 901 (a) (2) of the Revenue Act of 1938.

VI.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $75.00, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1939, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit E, referred to, and by this reference made a part hereof. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a copy of which said notice is hereto attached, marked Exhibit J, referred to, and by this reference made a part hereof.

VII.

That no part of said sum of $75.00 erroneously and illegally collected from plaintiff by defendant as aforesaid as [13] capital stock tax has been repaid or refunded to plaintiff, and said sum of $75.000, together with interest from the date of payment, is due, unpaid and owing from defendant to plaintiff.

SIXTH CAUSE OF ACTION

For another, further and sixth cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of Paragraphs I, II, III, VIII and XI of the first cause of action herein, and makes the same a part of this sixth cause of action, the same as if fully set forth herein.

II.

That plaintiff seeks to recover from defendant the sum of $99.00, together with interest thereon as provided by law from the date of payment thereof; said sum being the amount of capital stock tax for the taxable year ending June 30, 1940, erroneously and illegally assessed and collected from plaintiff by defendant.

III.

That on or about the 30th day of July, 1940, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1940, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $90,000.00 was declared in accordance with the provisions of law, and the tax of $99.00 based upon said declared value was duly paid on or about the 30th day of July, 1940, in the manner provided by law, by plaintiff to defendant.

IV.

That said sum paid by plaintiff as capital stock tax was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as a tax, or otherwise, [14] or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges:

V.

That the beneficiaries under the trust evidenced by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property, and were not an association within the intent and meaning of Section 3797 (a) (3) of the Internal Revenue Code.

VI.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $99.00, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1940, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit F, referred to, and by this reference made a part hereof. That thereafter plaintiff's claim for re-

fund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a copy of which said notice is hereto attached, marked Exhibit J, referred to, and by this reference made a part hereof.

VII.

That no part of said sum of $99.00 erroneously and illegally collected from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff, and said sum of $99.00, together with interest from the date of payment, is due, unpaid and owing from defendant to plaintiff.

SEVENTH CAUSE OF ACTION

For another, further and seventh cause of action herein, plaintiff alleges:

I.

Plaintiff realleges all of Paragraphs I, II, III, VIII and XI of the first cause of action herein, and makes the same a part of this seventh cause of action, the same as if fully set forth herein.

II.

That plaintiff seeks to recover from defendant the sum of $187.50, together with interest thereon as provided by law from the dates of payment thereof; said sum being being the amount of capital stock tax for the taxable year ending June 30, 1941, erroneously and illegally assessed and collected from plaintiff by defendant.

III.

That on or about the 30th day of July, 1941, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1941, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $150,000.00 was declared in accordance with the provisions of law, and the tax of $187.50 based upon said declared value was duly paid, in the manner provided by law, by plaintiff to defendant.

IV.

That said sum paid by plaintiff as capital stock tax was not at any time due to defendant or the Collector of Internal Revenue for the Sixth District of California as a tax, or otherwise, or at all, and was erroneously and illegally assessed and collected by defendant through its agents, and in this regard plaintiff alleges: [16]

V.

That the beneficiaries under the trust evidenced by the said trust agreements were associated together as joint adventurers in the development and sale of certain real property, and were not an association within the intent and meaning of Section 3797 (a) (3) of the Internal Revenue Code.

VI.

That on or about the 16th day of February, 1942,

plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $187.50, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1941, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a copy of said claim is hereto attached, marked Exhibit G, referred to, and by this reference made a part hereof. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a copy of which said notice is hereto attached, marked Exhibit J, referred to, and by this reference made a part hereof.

VII.

That no part of said sum of $187.50 erroneously and illegally collected from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff, and said sum of $187.50, together with interest from the dates of payment, is due, unpaid and owing from defendant to plaintiff.

Wherefore, plaintiff prays judgment against the defendant in the sum of $5,474.97, together with interest thereon as provided by law from the date

of payment thereof; for plaintiff's [17] costs herein incurred; and for such other and further relief as to the court may seem just in the premises.

LLOYD G. RAINEY and
PAUL C. JONES,
By /s/ LLOYD G. RAINEY,
Attorneys for Plaintiff.

EXHIBIT A

Form 843

Internal Revenue Service
Treasury Department
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collectors Stamp: (Dated received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Exhibit A—(Continued)

State of California,

County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, Bank of America National Trust and Savings Ass'n., Trustee.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from January 1, 1938, to December 31, 1938.

3. Character of assessment or tax: Income and Excess Profits Taxes.

4. Amount of assessment, $.....; dates of payment 2-17-39, $2,000.94; 7-8-1940, $58.56.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amount as may be legally refundable) $2,059.50.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be

Exhibit A—(Continued)

legally filed expires, under section 322 of the Internal Revenue Code on March 15, 1942.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,
By BANK OF AMERICAN NATIONAL TRUST AND SAVINGS ASS'N.,
Trustee.
By W. W. WATSON.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL,

Claimant was not an association coming within the meaning and intent of Section 901 (a) (2) of the Revenue Act of 1938 and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooks, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, are

Exhibit A—(Continued)

attached hereto, marked "Exhibit A" and "Exhibit B," respectively, referred to, and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property [20] conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to

Exhibit A—(Continued)

the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest, and therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Exhibit A—(Continued)

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee, and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation. [21]

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed an income and excess profits tax return for claimant for the calendar year 1938. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street,
Los Angeles, California. [22]

Declaration of Trust, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare,

Exhibit A—(Continued)

C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague, and Elizabeth S. Smith, Trustors and the Security Trust Company, a corporation of Bakersfield, California, Trustee,

Witnesseth:

That Whereas the Trustors have caused or will cause to be executed and delivered to the Trustee, a deed conveying to it that certain real property situated in the County of Kern, State of California, and more particularly described as:

The Southwest quarter (SW¼) of Section Twelve (12) in Township Twenty-nine (29) South, Range Twenty-seven (27) East, M.D.B. & M., subject to the restrictions, reservations, easements and rights of way of record and those also recited in the above mentioned deed, and

Whereas no part of the consideration therefor was paid by said Trustee except as herein otherwise mentioned and provided for, but was paid by or on behalf of the beneficiaries hereinabove named, and

Whereas the parties hereto desire the Trustee to hold said property in trust for the uses and purposes herein provided,

Now, Therefore, it is expressly understood and agreed that said Trustee will hold said real prop-

Exhibit A—(Continued)

erty in trust under the terms and conditions and for the uses and purposes set forth in this declaration, as follows:—

I.

(A Board of Managers consisting of three beneficiaries of this trust shall be vested with all the powers and shall be burdened with all the responsibilities provided therefor under this Declaration of Trust. Harry E. Hake, L. I. Weill and A. E. Stegeman shall constitute the first Board of Managers. Any two [23] members of said Board of Managers while in office shall have full power and authority to perform any act which the said Board are entitled to, or are required to perform hereunder. Each member of said Board shall hold office at the pleasure of the majority in interest of the beneficiaries of this trust. When the office of a member of the Board shall become vacant, upon his written resignation being filed with the Trustee; upon his removal from office by written memorandum signed by a majority in interest of the beneficiaries of the trust; by his death, or upon his ceasing to be a beneficiary of this trust, then the majority in interest of the beneficiaries may fill said office and file with the Trustee a memorandum signed by them, designating the member appointed to fill the vacancy.)

II.

The Trustee, hereinafter sometimes called the Payee, shall hold said property as security for the

Exhibit A—(Continued)

payment to it of the sum of Fourteen Thousand Dollars ($14,000.00) as evidenced by that certain promissory note signed by the Board of Managers dated January 28, 1926, together with interest thereon as therein provided, and for the payment to said Payee for such other loans and advances as may be made by Payee during the continuance of this Trust to the then acting Board of Managers as evidenced by any promissory note or notes executed by two or more members of said Board, together with interest thereon as herein provided. Each Trustor agrees that he, his successors and assigns, shall be severally liable to the Payee for payment of the balance due on said note or notes in the proportion set opposite his name as beneficiary hereunder.

III.

Said Trustee shall subdivide and improve said real property in such manner as may be agreed upon between the Board of Managers and Trustee hereunder.

In Which Event a map of such new Subdivision shall be [24] prepared by the Board of Managers, executed and acknowledged by the Trustee, and filed for record in the office of the County Recorder of Kern County, California, said Trustee being hereby authorized to dedicate to public use all streets and alleys shown on the Map of such new subdivision.

To Sell said real property by lot or lots free of

Exhibit A—(Continued)

the lien of the Payee hereunder, upon such terms and conditions, to such purchasers, for such prices and payable in such manner as said Trustee may deem best, provided however, that the sale prices of said property shall not be less than those agreed upon by said Trustee and the Board of Managers or the selling agent of said land acting under the provisions of Article IX of this Declaration, and

Provided further, however, that the selling price of any parcel of said property shall not be less than that portion of the amount then due the payee hereunder that the area of the parcel so sold bears to the then unsold parcels of all of said land and promises;

To Receive the proceeds arising from the sale of said property.

IV.

To Distribute the cash proceeds arising from the execution of said note or notes or from the sale of lot or lots hereunder as follows:

(1) To the payment of the costs, fees, and expenses of the Trustee hereunder.

(2) To the commission if any, of the authorized selling agent for making the sale of said property which is hereby fixed at ten per cent of the gross selling price;

Provided further however, that in the event of a sale of any of said property by contract or on

Exhibit A—(Continued)

installments, there shall be deducted and paid to the agent out of the installments received only one-half of the instalment toward said agent's [25] commission from time to time and until his commission has been fully paid.

(3) To the payment of the amount required to procure a release or releases of the lot or lots so sold from the lien of any encumbrance or encumbrances then of record against the same unless such lot or lots be sold subject thereto.

(4) To the payment of such bills approved by the Board of Managers for labor and material, if any, utilized for the improvement of the property covered hereby.

(5) To the Payee, to apply on the note or notes executed by the Board of Managers in connection with this Trust until such note or notes, together with interest and other advances due the Trustee hereunder have been fully paid.

(6) The balance thereof not otherwise required for the purpose of this Trust, to the Beneficiaries as their interest may appear.

V.

The Beneficiaries of this trust at the time of the creation of this trust and the ratio or share of their respective interests are as follows:

Harry E. Hake	2/28ths
L. I. Weill	2/28ths

Exhibit A—(Continued)

A. E. Stegeman	7/28ths
Anita Clare	2/28ths
C. O. Sprague	2/28ths
John P. Brook	2/28ths
Boyd I. Kern	1/28th
Thomas Hope	1/28th
Joe Smith	2/28ths
J. M. Kirby	2/28ths
K. S. McKee	2/28ths
Ruth M. Legerton	1/28th
F. T. Sprague	1/28th
Elizabeth S. Smith	1/28th

VI.

No Sale or Transfer of any beneficial interest hereunder shall be valid or be binding on said trustee until an executed original of the assignment or other instrument evidencing such sale or transfer has been filed with said Trustee, excepting only where such interest may pass or be transferred by Decree or Order of Court, and then only upon satisfactory proof of the regularity and validity of the proceedings in such matter being presented to said Trustee.

If The Property herein described or any portion thereof, or the proceeds or avails thereof, become liable for the payment of any inheritance, income, or other tax, said Trustee is authorized to withhold and pay such tax out of any money in its hands for the account of the person whose interests hereunder are so liable, unless such tax shall

Exhibit A—(Continued)

have been paid by such person or someone else in his behalf.

Provided, if any such tax be not so paid and there are not sufficient moneys in the hands of said trustee under this Trust to pay the same, the Trustee may, at its option (but shall not be obligated so to do), advance a sufficient sum to pay such tax, which advancement, with interest thereon at the rate of seven per cent (7%) per annum from date of advancement to date of repayment, shall constitute a first lien on said property covered hereby, subject only to the incumbrances hereinbefore described.

All of said Trustors hereunder do, severally, well and truly bind themselves to pay, when due, their respective proportions of the principal and interest of all liens, and encumbrances against the property covered hereby, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of said property or the title thereof, and the costs, charges and expenses of this trust, together with all other sums or amounts properly [27] payble by them in connection with this trust, the property herein described or the beneficial interests hereunder.

Said Trustee shall not be required to attend to or procure any insurance upon any building upon any property covered hereby, or to pay or attend to the payment of principal or interest of any debt

Exhibit A—(Continued)

or incumbrance, or any taxes or assessments levied or assessed against the property covered hereby so long as this Trust shall continue, or to collect or disburse any rentals thereof; but all such services shall be performed and the expenses thereof borne by said Trustors, their successors and assigns.

Nor shall said Trustee be required to commence or defend any suit or suits with respect to said property covered hereby unless request so to do in writing by said Trustors or Payees or Beneficiaries hereunder, or either of them, accompanied by a sum of money sufficient in the judgment of said Trustee, to cover all costs and charges in connection therewith.

It Is Distinctly Understood that all deeds, contracts of sale and other instruments affecting property covered hereby shall be executed solely by said Trustee;

And that all moneys in connection with this Trust (excepting only rentals as hereinbefore provided) shall be paid to said Trustee for distribution in accordance with the provisions herein set forth.

VII.

If Default is made in the payment of said debts to the Trustee or Payee secured hereby, or either or any of them, or any installment of interest on either or any of them, then said Trustee or Payee hereunder may declare all sums owing to it and secured hereby immediately due and payable, and

Exhibit A—(Continued)

shall execute and deliver and record in the office of the Recorder of the County in which the property covered hereby or some part thereof is situated, a notice of such default and breach and of election to cause said property to be sold to satisfy said obligations. [28]

And after three (3) months shall have elapsed following said recordation of said notice, said Trustee—without demand on the Beneficiaries or Payee hereunder or any other person—shall sell the property then covered hereby in such parcels and at such times and places as it shall deem best to accomplish the objects of these trusts, having first given notice of the time and place of such sale or sales, in the manner and for a time not less than that required by law for sales of real property upon execution.

The Trustee, from time to time, may postpone the sale of all or any portion of said property by publication, prior to the date of sale so advertised, a notice of postponement in the same newspaper or newspapers in which the original notice of sale was published, or by public announcement thereof at the time and place of sale so advertised or postponed.

Such Sale or sales shall be made in the following manner, namely:

At the Time and place of sale fixed as hereinbefore provided the Trustee may sell the property so advertised or any portion thereof either en masse

Exhibit A—(Continued)

or in separate parcels at its sole discretion, at public auction, to the highest bidder for cash in gold coin of the United States, and, after any such sale and due payment made, shall execute and deliver to the purchaser or purchasers, a deed or deeds conveying the property so sold to such purchaser or purchasers but without covenant or warranty, express or implied, regarding the title or incumbrances, whereupon such purchaser or purchasers shall be let into immediate possession of such property, and all other persons in possession thereof shall be deemed to be tenants at sufferance; and the recitals in each such deed, of any facts or matters affecting the regularity or validity of such sale, shall be conclusive proof of the truthfulness of such recitals, and such deed shall be conclusive against all persons as to all matters recited therein; and the receipt for the purchase money contained in any deed executed to a purchaser as aforesaid, shall be sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money according to the trusts herein contained or otherwise.

The Trustee or Payee or any person on its behalf, or any other person, may purchase at such sale.

Distribution of the proceeds, received by said Trustee, arising from such sale or sales, shall be made by it as follows:—

1st: To the payment of all expenses of such

Exhibit A—(Continued)

sale, including posting and advertising, and costs, fees, charges and expenses of this Trust; also Trustee's fee for making such sale hereby fixed at Two Hundred Dollars ($200.00) in said Gold coin; which said amounts shall all become due, and payable upon receipt by said Trustee of written declaration of default and demand aforesaid.

2nd: To the payment of all sums which may have been advanced by said Trustee for the preservation, maintenance or protection of the property covered hereby, the title thereto, or any beneficial interest hereunder, and not repaid, with accrued interest thereon.

3rd: To the payment to the Payee of all sums then due said Payee hereunder with accrued interest thereon.

4th: And the balance, (if any) to the person or persons legally entitled thereto.

VIII.

This Trust shall not cease or terminate in any event until all of the costs, fees, expenses, liabilities and advances with interest of said Trustee hereunder shall have been fully paid.

IX.

For a period of one year from date and thereafter until the Trustee is otherwise notified in writing by the Board of Managers, Harry E. Hake is hereby designated as the selling agent of said land and when he shall request the Trustee in writing

Exhibit A—(Continued)

to make a [30] sale of any lot or lots in said subdivision to such person, for cash or on such terms as shall be designated in said order, the Trustee shall proceed to sell by conveyance, or contract for the sale by agreement of such lots in accordance with such request. All such conveyances or agreements shall be subject to all of the restrictions, reservations, easements and rights of way of record.

X.

The power is hereby vested in the beneficiaries and said Trustee does hereby assent to the express power and right vested in said beneficiaries to revoke this trust in whole or in part at any time after one year from the date hereof by notice of revocation in writing addressed and delivered to said Trustee at least sixty days prior to such revocation taking effect, provided, however, that both the payee and the Trustee shall have been repaid all loans, advances and all other sums of money whatsoever due said Trustee and said payee under this Declaration and under the notes, obligations and other indebtedness hereby secured.

Upon the termination of this trust at the expiration of said sixty days and the repayment of all of said loans, advances and other obligations due the payee and the Trustee hereunder the Trustee shall transfer, convey and deliver to the then beneficiaries hereunder as their interest may appear, the title to all of the said land and premises then vested in the Trustee hereunder, subject, however, to the

Exhibit A—(Continued)

then existing contracts of sale, agreements, leases, tax liens and assessments, encumbrances and other obligations incurred in reference thereto.

XI.

The costs, fees and expenses of the Trustee hereunder are hereby fixed as follows:

1st: Usual fees for preparing, executing, and recording instruments, and issuing Guarantee showing title to the real property covered hereby vested in said Trustee; together with expense of internal revenue or such other tax as may be imposed by [31] law upon all instruments necessary for execution hereunder; also proper compensation for preparing income and other tax reports required by law.

2nd: One Hundred Dollars ($100.00) for the drawing and execution of this Declaration and the acceptance of this trust. Should this trust not terminate within one year from the date hereof, then said Trustee shall receive an additional sum of Twenty-five dollars ($25.00) for each year, or fractional year, thereafter.

3rd: One per cent (1%) of the cash consideration paid upon the outright purchase of any property covered hereby or of the initial or down payment made by any purchaser under contract or agreement of sale; and 2% of the installments of principal and interest collected under agreements or contract or sale on any property covered by this Declaration.

Exhibit A—(Continued)

4th: And reasonable compensation for any service rendered by said Trustee in the execution of this trust for which the costs, fees and expenses are not herein provided.

5th: The sum of Twenty-five Dollars ($25.00) for the final closing, distributing and settlement of this trust.

In Witness Whereof the parties hereto have hereunto set their hands this 28th day of January, 1926, at Bakersfield, California.

Harry E. Hake	F. E. Sprague
L. I. Weill	Joe Smith
A. E. Stegeman	J. M. Kirby, M.D.
Anita Clare	K. S. McKee
C. O. Sprague	Elizabeth S. Smith
John P. Brooke	Thomas Hope
Boyd Kern	Ruth M. Legerton

SECURITY TRUST COMPANY,

A Corporation.

As Trustor.

By C. C. LEGERTON,

Its Assistant,

Trust Officer. [32]

Exhibit A—(Continued)

EXHIBIT "B"

HOMECREST SUPPLEMENTAL

AGREEMENT

Whereas, by agreement dated on or about the 28 day of January, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd T. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, as Trustors, and Security Trust Company, a corporation of Bakersfield, California, as Trustee, a Declaration of Trust was made whereby said Security Trust Company acknowledged the holding i ntrust upon the terms and conditions therein specified, of the following real property situate in the County of Kern, State of California, particularly described as follows, to-wit:

The Southwest Quarter (SW¼) of Section Twelve (12) in Township Twenty-nine (29) South, Range Twenty-seven (27) East, M.D.B. & M.;

And Whereas, Bank of America National Trust and Savings Association is now the successor to said Security Trust Company, and as such successor has succeeded to all the rights, powers, duties and liabilities conferred or imposed upon said Security Trust Company under the terms of said Declaration of Trust; and

Exhibit A—(Continued)

Whereas, Paragraph II of said Declaration of Trust provides as follows:

"The Trustee, hereinafter sometimes called the Payee, shall hold said property as Security for the payment to it of the sum of Fourteen Thousand dollars ($14,000.00) as evidenced by that certain promissory note signed by the Board of Managers dated January 28, 1926, together with interest thereon as therein provided, and for the payment to said Payee for such other loans and advances as may be made by the Payee during the continuance of this Trust to the then acting Board of Managers as evidenced by any promissory note or notes executed by two or more members of said Board, together with interest thereon as therein provided. Each Trustor agrees that he, his successors and assigns, shall be severally liable to the Payee for payment of the balance due on said note or notes in the proportion set opposite his name as beneficiary hereunder."

And Whereas, said Bank of America National Trust and Savings Association may, pursuant to the provisions of said Paragraph II, make other loans and advances under said Declaration of Trust evidenced by promissory note or notes executed by the Board of Managers as created by said Declaration of Trust, upon the condition, however, that the beneficiaries under said Declaration of Trust shall agree to become personally liable to said Bank of America National Trust and Savings Association for such loans or advances in the proportion that the inter-

Exhibit A—(Continued)

est of each beneficiary bears to the total of the beneficial interests held by said beneficiaries,

Now, Therefore, it is hereby agreed as follows, to-wit:

1. That said Bank of America National Trust and Savings Association may make such loans and advances, as in its discretion it may determine, to said Board of Managers, to be evidenced by promissory note or notes executed by said Board of Managers.

2. That the repayment of said loans or advances shall be secured by said Declaration of Trust and enforced according to the terms and conditions set forth in said Declaration of Trust.

3. That the said Board of Managers may execute a promissory note or notes evidencing said loans or advances and specifying the time and manner of repayment, and the interest thereon, and that said notes may be renewed from time to time as agreed upon [34] between Bank of America National Trust and Savings Association and said Board of Managers.

4. That each of the undersigned being present beneficiaries under said declaration of trust shall be personally liable to said Bank of America National Trust and Savings Association for said loans or advances to the extent of the fractional interest of each beneficiary as set opposite the signature of each beneficiary on this agreement, and that the

Exhibit A—(Continued)

extent and manner of such liability shall be determined by the promissory note or notes executed by said Board of Managers to evidence said loans or advances or any renewals thereof.

5. That said personal liability of the undersigned beneficiaries may be enforced by said Bank of America National Trust and Savings Association without resort to the foreclosure proceedings provided for in said Declaration of trust.

6. The personal liability hereby authorized shall be a several liability and its creation and enforcement shall be several and shall not be dependent upon the execution of this agreement by all the persons, beneficiaries under said Declaration of Trust at the time such loans or advances are made by Bank of America National Trust and Savings Association, but shall be enforceable only against such signatory beneficiaries as are beneficiaries under said Declaration of trust, as shown on the records of said Bank of America National Trust and Savings Association, in the manner provided by said Declaration of Trust, and subsequent assignees and transferees or successors of any of the signatory beneficiaries, by the subscription to and execution of this agreement shall become parties hereto as if originally subscribed to and executed by them.

Exhibit A—(Continued)

In Witness Whereof the parties hereto have hereunto set their hands this 23rd day of June, 1937.

Signed by

F. E. SPRAGUE	1/28th
L. I. WEILL	2/28ths
BOYD KERN	1/28th
JOE SMITH	2/28ths
ELIZABETH S. SMITH	1/28th
Transferred to Stegeman	2/28ths
E. H. CLARE	
C. O. SPRAGUE	2/28ths
THOMAS HOPE	1/28th
J. M. KIRBY, M.D.	2/28ths
JOHN P. BROOKE	4/28ths
LOUIS WILLIAMS	1/28th
A. E. STEGEMAN	11/28ths

EXHIBIT B

Form 843

Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: (Date received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, Bank of America National Trust and Savings Ass'n., Trustee.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from January 1, 1939, to December 31, 1939.

3. Character of assessment or tax: Income and Excess Profits Taxes.

4. Amount of assessment, $1,856.54; dates of payment, February 21, 1940.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amounts as may be legally refundable) $1,856.54.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be legally filed expires, under section 322 of the Internal Revenue Code on March 15, 1943.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,

By BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N., TRUSTEE,

By W. D. WATSON,

Trust Officer.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL.

Claimant was not an association coming within the meaning and intent of Section 3797 (a) (3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooks, Boyd I. Kern,

Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B", respectively, and attached to a claim for refund of income and excess profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of

certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers. [38]

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encum-

brances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation. [39]

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed an income and excess profits tax return for claimant for the calendar year 1939. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America, National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,

810 South Spring Street,

Los Angeles, California. [40]

EXHIBIT C

Form 843

Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: (Date received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,

County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, Bank of America National Trust and Savings Ass'n., Trustee.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from January 1, 1940, to December 31, 1940.

3. Character of assessment or tax: Income, Excess Profits and Defense Taxes.

4. Amount of assessment, $1,147.43; dates of payment, March 12, 1941.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amount as may be legally refundable) $1,147.43.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be

legally filed expires, under section 322 of the Internal Revenue Code on March 15, 1944.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,

By BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N., TRUSTEE,

By W. D. WATSON,

Trust Officer.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL.

Claimant was not an association coming within the meaning and intent of Section 3797 (a) (3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth H. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeed by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed

concurrently herewith, marked "Exhibit A" and "Exhibit B", respectively, and attached to a claim for refund of income and excess profits taxes, filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers. [42]

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely per-

sonal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property

covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation. [43]

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed an income and excess profits tax return for claimant for the calendar year 1940. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as Trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,

810 South Spring Street,

Los Angeles, California. [44]

EXHIBIT D

Form 843

Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: (Date received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, No. S-4521, Bank of America National Trust and Savings Ass'n., Trustee.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on

behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from July 1, 1937, to June 30, 1938.

3. Character of assessment or tax: Capital Stock Tax.

4. Amount of assessment, $50.00; dates of payment, July 26, 1938.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amount as may be legally refundable) $50.00.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be legally filed expires, under section 3313 of the Internal Revenue Code, on July 26, 1942.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,
By BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N., TRUSTEE,

By W. D. WATSON,
Trust Officer.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL.

Claimant was not an association coming within the meaning and intent of Section 1001 (a) (2) of the Revenue Act of 1936 and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B", respectively, and attached to a claim for refund of income and excess profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of

the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following; holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers. [46]

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in addi-

tional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation. [47]

Bank of America National Trust and Savings Association, trustee, under said declaration of trust, duly filed a capital stock return for the year ending June 30, 1938. The said declaration of trust has not been revoked and said Bank of America Na-

tional Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street,
Los Angeles, California. [48]

EXHIBIT E

Form 843

Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: (Date received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the

kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, Bank of America National Trust and Savings Ass'n., Trustee.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from July 1, 1938, to June 30, 1939.

3. Character of assessment or tax: Capital Stock Tax.

4. Amount of assessment, $75.00; dates of payment, August 18, 1939.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amount as may be legally refundable) $75.00

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be legally filed expires, under section 3313 of the Internal Revenue Code, on August 18, 1943.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,

By BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N., TRUSTEE,

By W. D. WATSON,

Trustee Officer.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL.

Claimant was not an association coming within the meaning and intent of Section 901 (a) (2) of the Revenue Act of 1938 and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Byod I. Kern,

Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B", respectively, and attached to a claim for refund of income and excess profits taxes, filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in according with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of

the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of [50] Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the prin-

cipal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated [51] by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year ending June 30, 1939. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee,

and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street,
Los Angeles, California. [52]

EXHIBIT F

Form 843

Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: (Date received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,

County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, Bank of America National Trust and Savings Ass'n.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from July 1, 1939, to June 30, 1940.

3. Character of assessment or tax: Capital Stock Tax.

4. Amount of assessment, $99.00; dates of payment, July 30, 1940.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amount as may be legally refundable) $99.00.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be

legally filed expires, under section 3313 of the Internal Revenue Code, on July 30, 1944.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,

By BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N., TRUSTEE,

By W. D. WATSON,

Trust Officer.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL.

Claimant was not an association coming within the meaning and intent of Section 3797 (a) (3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937,

have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B", respectively, and attached to a claim for refund of income and excess profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of [54] Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely per-

sonal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest, and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessment, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection wtih the

trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a [55] corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year ending June 30, 1940. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street,
Los Angeles, California. [56]

EXHIBIT G

Form 843

Treasury Department
Internal Revenue Service
(Revised Jan. 1946)

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp: (Date received) Received Feb. 16, 1942. Coll. Int. Rev., 6th Dist. Cal.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Kern—ss.

Name of taxpayer or purchaser of stamps: Homecrest Tract, Bank of America National Trust and Savings Ass'n., Trustee.

Business address: 1931 Chester Avenue, Bakersfield, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on

behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Sixth California.

2. Period (if for income tax, make separate form for each taxable year) from July 1, 1940, to June 30, 1941.

3. Character of assessment or tax: Capital Stock Tax.

4. Amount of assessment, $187.50; dates of payment, 7-30-1941, $165.00; 1-9-42, $22.50.

5. Date stamps were purchased from the Government.

6. Amount to be refunded (or such greater amount as may be legally refundable) $187.50.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be legally filed expires, under section 3313 of the Internal Revenue Code, on January 9, 1946.

The deponent verily believes that this claim should be allowed for the following reasons:

/s/ HOMECREST TRACT,
By BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASS'N., TRUSTEE,
By W. D. WATSON,
Trust Officer.

Sworn to and subscribed before me this 10th day of February, 1942.

E. CASSEL.

Claimant was not an association coming within the meaning and intent of Section 3797 (a) (3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B", respectively, and attached to a claim for refund of income and excess profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers. [58]

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several

beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation. [59]

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year ending June 30, 1941. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street,
Los Angeles, California. [60]

EXHIBIT H

Treasury Department
Washington

Aug. 10, 1942.

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue and Refer to IT:C1:CC:Rej. Homecrest Tract, c/o Bank of America National Trust & Savings Ass'n., Bakersfield, California.

In re: Claims for refund of $2,059.50 and $1,856.54 for the years 1938 and 1939.

Sirs:

Reference is made to revenue agent's report dated April 27, 1942 with respect to your tax liability. A copy of the report was forwarded to you, and

you were informed that the claim or claims for refund indicated above would be disallowed.

In accordance with the provisions of section 3772 (a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

Respectfully,

GUY T. HELVERING,
Commissioner,

By T. MOONEY,
Deputy Commissioner. [61]

EXHIBIT I

Treasury Department
Washington

Oct. 1, 1942

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to IT:C1:CC:Rej. Homecrest Tract, Bank of America National Trust and Savings Association, Bakersfield, California.

In re: Claim for refund of $1,147.43 for the year of 1940.

Sirs:

Reference is made to claim or claims, referred to above, filed by you for the refund of income taxes.

By a Certificate of Overassessment you were advised of an allowance on Schedule of Overassess-

ment numbered IT-82516 for the taxable year referred to, and that to the extent your claim was disallowed in connection with such Certificate of Overassessment notice would be issued.

In accordance with the provisions of section 3772 (a)(2) of the Internal Revenue Code, this notice of disallowance of your claim or claims, to the extent not previously allowed, is hereby given by registered mail.

Respectfully,
GUY T. HELVERING,
Commissioner,
By T. MOONEY
Deputy Commissioner. [62]

EXHIBIT J

Treasury Department
Washington

Sep. 19, 1942

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to MT:CST:JK 566782. Cls.CST-174195-6-7-8. Bank of America, Bakersfield, California.

Attention: Trust Department.

In re: Homecrest Tract.

Gentlemen:

Consideration has been given to your claims for the refund of capital stock tax paid in behalf of the

above-named trust for the taxable years 1938 to 1941, inclusive, amounting to $411.50.

The claims are based on the ground that Homecrest Tract is a trust and not an association taxable as a corporation.

The Bureau has ruled that the above trust is an association taxable as a corporation for income tax purposes. Since the status of the taxpayer for income tax purposes governs its status for capital stock tax purposes, the claims for refund on the ground that the taxpayer is not taxable as a corporation are, accordingly, rejected.

Respectfully,
GUY T. HELVERING,
Commissioner.
By D. S. BLISS,
Deputy Commissioner.

Registered mail.

cc-Los Angeles, California [63]

State of California,
County of Kern—ss.

R. C. Hinderliter being by me first duly sworn, deposes and says: that he is an officer, to-wit, Assistant Trust Officer of Bank of America National Trust and Savings Association, Trustee of Homecrest Tract, plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his informa-

tion or belief, and as to those matters that he believes it to be true. That he makes this verification for and on behalf of said Bank of America National Trust and Savings Association, Trustee, and as such officer thereof.

R. C. HINDERLITER.

Subscribed and sworn to before me this 7th day of August, 1944.

(Seal) (Signature of Notary Public is illegible.)

Notary Public in and for the County of Kern, State of California.

My commission expires January 18, 1946.

[Endorsed]: Filed Aug. 9, 1944. [64]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant, the United States of America, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and answers the complaint on file herein as follows:

FIRST CAUSE OF ACTION:

I.

Admits the allegations of Paragraphs I, II, V and IX of the complaint.

II.

Answering the allegations of Paragraph III, defendant denies that the taxes referred to were illegally assessed or collected. Admits the remaining allegations of Paragraph III. [65]

III.

Answering the allegations of Paragraph IV, defendant denies that the taxes referred to were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph IV.

IV.

Defendant denies each and every allegation of Paragraph VI.

V.

Defendant has no information or belief upon the allegations of Paragraph VIII and because of its lack of information and belief thereon, denies each and every allegation in Paragraph VIII.

VI.

Answering the allegations of Paragraph X, defendant admits that the taxes referred to in said paragraph have not been refunded to the plaintiff Denies all the remaining allegations of Paragraph XI.

VII.

Defendant has no information or belief upon the allegations of Paragraph XI, and because of its lack of information and belief thereon, denies each and every allegation of Paragraph XI.

SECOND CAUSE OF ACTION:

I.

Answering the allegations of Paragraph I, defendant refers to its answer to Paragraphs I, II, III, VIII and and XI of the first cause of action, and makes the same a part of its answer to the second cause of action, the same as if fully set forth herein. [66]

II.

Answering the allegations of Paragraph II, defendant denies that the taxes referred to were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph II.

III.

Admits the allegations of Paragraph III.

IV.

Denies each and every allegation of Paragraph IV.

V.

Denies each and every allegation of Paragraph V.

VI.

Admits the allegations of Paragraph VI.

VII.

Defendant admits that the taxes referred to in Paragraph VII have not been refunded to the plaintiff. Denies all the remaining allegations of Paragraph VII.

THIRD CAUSE OF ACTION:

I.

Defendant refers to its answer to Paragraphs I,

II, III, VIII and XI of the first cause of action, and makes the same a part of its answer to the third cause of action, the same as if fully set forth herein.

II.

Defendant denies that the taxes referred to in Paragraph II, were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph II.

III.

Admits the allegations of Paragraph III. [67]

IV.

Denies each and every allegation of Paragraphs IV and V.

V.

Admits the allegations of Paragraph VI.

VI.

Defendant admits that the taxes referred to in Paragraph VII have not been refunded to the plaintiff. Denies the remaining allegations of Paragraph VII.

FOURTH CAUSE OF ACTION:

I.

Defendant refers to its answer to Paragraphs I, II, III, VIII and XI of the first cause of action and makes said answer a part of its answer to the fourth cause of action, the same as if fully set forth herein.

II.

Defendant denies that the taxes referred to in Paragraph II were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph II.

III.

Admits the allegations of Paragraph III.

IV.

Denies each and every allegation in Paragraph IV and V.

V.

Admits the allegations of Paragraph XI.

VI.

Defendant admits that on part of the taxes referred to in Paragraph VII have been refunded to the plaintiff. Denies the remaining allegations of Paragraph VII. [68]

FIFTH CAUSE OF ACTION:

I.

Defendant refers to its answer to Paragraphs I, II, III, VIII and XI of the first cause of action, and makes said answer a part of its answer to the fifth cause of action the same as if fully set forth herein.

II.

Defendant denies that the taxes referred to in Paragraph II were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph II.

III.

Admits the allegations of Paragraph III.

IV.

Defendant denies each and every allegation in Paragraphs IV and V.

V.

Defendant admits the allegations of Paragraph VI.

VI.

Defendant admits that the taxes referred to in Paragraph VII have not been refunded to the plaintiff. Denies the remaining allegations of Paragraph VII.

SIXTH CAUSE OF ACTION:

I.

Defendant refers to its answer to Paragraphs I, II, III, VIII and XI of the first cause of action and makes the same a part of its answer to the sixth cause of action, the same as if fully set forth herein.

II.

Defendant denies that the taxes referred to in Paragraph II were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph II. [69]

III.

Defendant admits the allegations of Paragraph III.

IV.

Defendant denies each and every allegation of Paragraphs IV and V.

V.

Defendant admits the allegations of Paragraph VI.

VI.

Defendant admits that no part of the taxes referred to in Paragraph VII have been refunded to the plaintiff. Denies the remaining allegations in Paragraph VII.

SEVENTH CAUSE OF ACTION:

I.

Defendant refers to its answer to Paragraphs I, II, III, VIII and XI of the first cause of action and makes said answer a part of its answer to the seventh cause of action, the same as if fully set forth herein.

II.

Defendant denies that the taxes referred to in Paragraph II were erroneously or illegally assessed or collected. Admits the remaining allegations of Paragraph II.

III.

Defendant admits the allegations of Paragraph III.

IV.

Defendant denies each and every allegation of Paragraphs IV and V.

V.

Defendant admits the allegations of Paragraph VI. [70]

VI.

Defendant admits that the taxes referred to in Paragraph VII have not been refunded to the plaintiff. Denies all the remaining allegations of Paragraph VII.

Wherefore defendant prays for judgment in its favor, together with costs, and for such other relief as may be just.

/s/ FRANK J. HENNESSY,
United States Attorney,

/s/ ESTHER B. PHILLIPS,
Assistant United States Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Oct 6, 1944. [71]

[Title of District Court and Cause.]

AMENDED ANSWER

Now comes the defendant, the United States of America, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and for its amended answer to the complaint herein admits, alleges and denies:

I.

Defendant reaffirms the admissions, allegations

and denials contained in the answer heretofore filed in this action, as though fully set forth herein.

NEW MATTER

For a further defense and as new matter defendant alleges:

I.

That if plaintiff was not association taxable as a corporation during the calendar years 1938 to 1940, inclusive, then it was taxable as a pure trust.

II.

That plaintiff's income tax liability for the year 1938, based upon the assumption that it was taxable as a pure trust and not as an association taxable as a corporation, has been recomputed and amounts to the sum of $400.01. [73]

III.

That in the event it is held in this action that plaintiff was not an association taxable as a corporation the refund of 1938 income and excess profits taxes for which the plaintiff should have judgment should be the amount paid, $2059.50, reduced by the amount of $400.01 as an offset in favor of the defendant, or $1658.49 with interest thereon from the date of payment.

Wherefore defendant prays for judgment:

(1) That this action be dismissed with costs to the defendant;

(2) That if judgment be granted to the plain-

tiff for the recovery of income and excess profits taxes paid for the calendar year 1938, the amount should be $1658.49 with legal interest thereon from the date of payment of 1938 taxes by plaintiff, representing the total amount paid by plaintiff as income and excess profits taxes as an association taxable as a corporation, less $400.00, representing the amount of income tax liability of plaintiff for 1938 as a pure trust;

(3) For such other and further relief as to the Court may seem just and proper.

/s/ FRANK J. HENNESSY,
United States Attorney

/s/ A. K. LICKING
Assistant United States Attorney
Attorneys for Defendant

[Endorsed]: Filed May 19, 1945. [74]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed that the following facts are true.

I.

That Bank of America National Trust and Savings Association above named at all times mentioned was a national banking association, duly or-

ganized and existing under the laws of the United States, with its principal office located in the City and County of San Francisco, State of California, and in the Northern District of California, Southern Division.

That plaintiff has at all times borne true allegiance to the government of the United States of America, and has not in any way voluntarily aided, abetted or given encouragement to a rebellion against said government, nor at any time aided or abetted in any manner or given comfort to any sovereign or government that is, [75] or ever has been, at war with said United States.

II.

That on or about the 28th day of January, 1926, in the City of Bakersfield, County of Kern, State of California, Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague, and Elizabeth S. Smith, as Trustors, entered into a trust agreement with the Security Trust Company, a California corporation, as Trustee, and conveyed certain real property to said Trustee, and that on or about the 23rd day of June, 1937, said individuals executed a supplemental agreement. That true copies of said trust agreement and supplemental agreement, Exhibit A attached hereto, are hereby referred to, and made a part hereof, and introduced into evidence as plaintiff's Exhibit A,

and may be considered for all purposes as though they were the originals thereof. That Security Trust Company was succeeded in interest as Trustee of said trust on or about the 23rd day of June, 1937, by the above-named Bank of America National Trust and Savings Association, and the latter ever since has been, and still is, the duly constituted and acting Trustee of said trust and the real party in interest in this action.

III.

That at all times herein mentioned the above named defendant was, and now is, a sovereign body politic, by whom, through its agents, the taxes for which refund is here claimed were assessed and collected.

IV.

Plaintiff seeks to recover from defendant the sum of $5,474.97, together with interest as provided by law from the dates of payment thereof; said sum being made up as follows: [76]

(1) $2,059.50 income and excess profits taxes for the taxable year ending December 31, 1938;

(2) $1,856.54 income and excess profits taxes for the taxable year ending December 31, 1939;

(3) $1,147.43 income and defense taxes for the taxable year ending December 31, 1940;

(4) $50.00 capital stock tax for the taxable year ending June 30, 1938;

(5) $75.00 capital stock tax for the taxable year ending June 30, 1939;

(6) $99.00 capital stock tax for the taxable year ending June 30, 1940;

(7) $187.50 capital stock tax for the taxable year ending June 30, 1941.

V.

That on or about the 17th day of February, 1939, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed income and excess-profits tax return for the taxable year ending December 31, 1938, on Form 1120A issued by the Treasury Department of the United States. That said return disclosed a tax liability for said taxable year in the amount of $2,000.94. That said tax was duly paid on or about the 17th day of February, 1939, in the manner provided by law. That thereafter a deficiency assessment of income tax for said taxable year was made against plaintiff in the amount of $54.31, which said deficiency assessment, together with interest in the amount of $4.25, was paid by plaintiff to defendant on or about the 8th day of July, 1940. That the total amount paid by plaintiff to defendant as income and excess-profits taxes for said taxable year, and interest thereon, as aforesaid, was the sum of $2,059.50. [77]

VII.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of In-

ternal Revenue for the Sixth District of California, its written claim for refund of income and excess-profits taxes in the amount of $2,059.50, or such greater amount as may be legally refundable, for said taxable year ending December 31, 1938, according to the provisions of law in that regard [79] and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit B, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit B, and may be considered for all purposes as though it was the original. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated August 10, 1942, a true copy of which said notice is hereto attached, marked Exhibit I, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit I, and may be considered for all purposes as though it was the original.

VIII.

That no part of said sum of $2,059.50 collected from plaintiff by defendant as aforesaid as income and excess-profits taxes, and interest thereon, has been repaid or refunded to plaintiff.

IX.

That plaintiff is the sole and absolute owner of

the claims here sued upon, and has made no transfer or assignment of the same, or any part thereof, or of any interest therein. No action upon said claims here sued upon has been taken before Congress, or other of the departments of said government or any court other than the complaint filed in this court.

X.

That on or about the 21st day of February, 1940, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed income and [80] excess-profits tax return for the taxable year ending December 31, 1939, on Form 1120A issued by the Treasury Department of the United States. That said return disclosed a tax liability for said taxable year in the amount of $1,894.14. That said tax was duly paid on or about the 21st day of February, 1940, in the manner provided by law. That thereafter an overassessment of income tax for said taxable year was made against said plaintiff in the amount of $37.60. That the total amount paid by plaintiff to defendant as income and excess-profits taxes for said taxable year, as aforesaid, was the sum of $1,856.54.

XI.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of Cali-

fornia, its written claim for refund of income and excess-profits taxes in the amount of $1,856.54, or such greater amount as may be legally refundable, for said taxable year ending December 31, 1939, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit C, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit C, and may be considered for all purposes as though it was the original. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated August 10, 1942, a true copy of which said notice is hereto attached, marked Exhibit I, referred to, and by this reference made a part hereof.

XII.

That no part of said sum of $1,856.54 collected from plaintiff by defendant as aforesaid as income and excess-profits [81] taxes has been repaid or refunded to plaintiff.

XIII.

That on or about the 12th day of March, 1941, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed income, declared

value excess-profits and defense tax return for the taxable year ending December 31, 1940, on Form 1120 issued by the Treasury Department of the United States. That said return disclosed a tax liability for said taxable year in the amount of $1,147.43. That said tax was duly paid on or about the 12th day of March, 1941, in the manner provided by law. That thereafter an overassessment of income tax for said taxable year was made against plaintiff in the amount of $53.45, which said overassessment, together with interest thereon, remains unpaid. That the total amount paid by plaintiff to defendant as income and defense taxes for said taxable year was the sum of $1,147.43.

XIV.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of income, excess-profits and defense taxes in the amount of $1,147.43, or such greater amount as may be legally refundable, for said taxable year ending December 31, 1940, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit D, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit D, and may be con-

sidered for all purposes as though it was the original. That plaintiff's claim [82] for refund was thereafter rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated October 1, 1942, a true copy of which said notice is hereto attached, marked Exhibit J, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit J, and may be considered for all purposes as though it was the original.

XV.

That no part of said sum of $1,147.43 collected from plaintiff by defendant as aforesaid as income and defense taxes has been repaid or refunded to plaintiff.

XVI.

That on or about the 26th day of July, 1938, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1938, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $50,000.00 was declared in accordance with the provisions of law, and the tax of $50.00 based upon said declared value was duly paid on or about the 26th day of July, 1938 in the manner provided by law by plaintiff to defendant.

XVII.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $50.00, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1938, according to the provisions of law in that regard and the regulations of the of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds [83] as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit E, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit E, and may be considered for all purposes as though it was the original. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a true copy of which said notice is hereto attached, marked Exhibit K, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit K, and may be considered for all purposes as though it was the original.

XVIII.

That no part of said sum of $50.00 collected from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff.

XIX.

That on or about the 18th day of August, 1939 plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1939, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $75,000.00 was declared in accordance with the provisions of law, and the tax of $75.00 based upon said declared value was duly paid on or about the 18th day of August, 1939 in the manner provided by law, by plaintiff to defendant.

XX.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $75.00, or such greater amount as may be legally [84] refundable, for said taxable year ending June 30, 1939, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit F, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit F, and may be considered for all pur-

poses as though it was the original. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a true copy of which said notice is hereto attached, marked Exhibit K, referred to, and by this reference made a part hereof.

XXI.

That no part of said sum of $75.00 collected from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff.

XXII.

That on or about the 30th day of July, 1940, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1940, on Form 707 issued by the Treasury Department of the United States. That on said return a value of $90,000.00 was declared in accordance with the provisions of law, and the tax of $99.00 based upon said declared value was duly paid on or about the 30th day of July, 1940, in the manner provided by law, by plaintiff to defendant.

XXIII.

That on or about the 16th day of February, 1942, plaintiff duly made and filed with the Commissioner of Internal Revenue through the Collector of Internal Revenue for the Sixth District [85] of Cali-

fornia, its written claim for refund of capital stock tax in the amount of $99.00, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1940, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit G, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit G, and may be considered for all purposes as though it was the original. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a true copy of which said notice is hereto attached, marked Exhibit K, referred to, and by this reference made a part hereof.

XXIV.

That no part of said sum of $99.00 collected from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff.

XXV.

That on or about the 30th day of July, 1941, plaintiff caused to be prepared and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its duly executed capital stock tax return for the taxable year ending June 30, 1941, on Form 707 issued by the Treasury Department of the United

States. That on said return a value of $150,000.00 was declared in accordance with the provisions of law, and the tax of $187.50 based upon said declared value was duly paid, in the manner provided by law, by plaintiff to defendant.

XXVI.

That on or about the 16th day of February, 1942, plaintiff [86] duly made and filed with the Commissioner of Internal Revenue, through the Collector of Internal Revenue for the Sixth District of California, its written claim for refund of capital stock tax in the amount of $187.50, or such greater amount as may be legally refundable, for said taxable year ending June 30, 1941, according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, alleging as the basis of said claim the same grounds as hereinbefore stated; a true copy of said claim is hereto attached, marked Exhibit H, referred to, and by this reference made a part hereof, and introduced into evidence as plaintiff's Exhibit H, and may be considered for all purposes as though it was the original. That thereafter plaintiff's claim for refund was rejected and plaintiff received notice of rejectment of said claim from the Commissioner of Internal Revenue dated September 19, 1942, a copy of which said notice is hereto attached, marked Exhibit K, referred to, and by this reference made a part hereof.

XXVII.

That no part of said sum of $187.50 collected

from plaintiff by defendant as aforesaid as capital stock tax has been repaid or refunded to plaintiff.

XXVIII.

That attached to and made a part of plaintiff's original claim for refund for the year 1937 (Plaintiff's Exhibit B attached hereto) were a copy of the original trust agreement and a copy of the supplemental agreement (Plaintiff's Exhibit A attached hereto). Said copies of the original trust agreement and supplemental agreement so attached to said claim for refund were marked respectively "Exhibit A" and "Exhibit B," and are deemed to be so attached to said claim for refund (Exhibit B attached hereto) for all purposes herein. [87]

Dated: May 22nd, 1945.

LLOYD C. RAINEY and PAUL C. JONES.

By /s/ [Illegible]

Attorneys for Plaintiff.

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ W. E. LICKING,

Assistant United States Attorney, Attorneys for Defendant. [88]

EXHIBIT "A"

Declaration of Trust, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth

Exhibit "A"—(Continued)

M. Legerton, F. E. Sprague, and Elizabeth S. Smith, Trustors, and the Security Trust Company, a corporation of Bakersfield, California, Trustee.

Witnesseth:

That Whereas the Trustors have caused or will cause to be executed and delivered to the Trustee, a deed conveying to it that certain real property situated in the County of Kern, State of California, and more particularly described as:

The Southwest quarter (SW¼) of Section Twelve (12) in Township Twenty-nine (29) South, Range Twenty-seven (27) East, M.D.B. & M., subject to the restrictions, reservations, easements and right of way of record and those also recited in the above-mentioned deed, and

Whereas no part of the consideration therefor was paid by said Trustee except as herein otherwise mentioned and provided for, but was paid by or on behalf of the beneficiaries hereinabove named, and

Whereas the parties hereto desire the Trustee to hold said property in trust for the uses and purposes herein provided,

Now, Therefore, it is expressly understood and agreed that said Trustee will hold said real property in trust under the terms and conditions and for the uses and purposes set forth in this declaration, as follows:—

Exhibit "A"—(Continued)

I.

(A Board of Managers consisting of three beneficiaries of this trust shall be vested with all the powers and shall be burdened with all the responsibilities provided therefor under this Declaration of Trust. Harry E. Hake, L. I. Weill and A. E. Stegeman shall constitute the first Board of Managers. Any two [89] members of said Board of Managers while in office shall have full power and authority to perform any act which the said Board are entitled to, or are required to perform hereunder. Each member of said Board shall hold office at the pleasure of the majority in interest of the beneficiaries of this trust. When the office of a member of the Board shall become vacant, upon his written resignation being filed with the Trustee; upon his removal from office by written memorandum signed by a majority in interest of the beneficiaries of the trust; by his death, or upon his ceasing to be a beneficiary of this trust, then the majority in interest of the beneficiaries may fill said office and file with the Trustee a memorandum signed by them, designating the member appointed to fill the vacancy.)

II.

The Trustee, hereinafter sometimes called the Payee, shall hold said property as security for the payment to it of the sum of Fourteen Thousand Dollars ($14,000.00) as evidenced by that certain promissory note signed by the Board of Mana-

Exhibit "A"—(Continued)

gers dated January 28, 1926, together with interest thereon as therein provided, and for the payment to said payee for such other loans and advances as may be made by the Payee during the continuance of this Trust to the then acting Board of Managers as evidenced by any promissory note or notes executed by two or more members of said Board, together with interest thereon as therein provided. Each Trustor agrees that he, his successors and assigns, shall be severally liable to the Payee for payment of the balance due on said note or notes in the proportion set opposite his name as beneficiary hereunder.

III.

Said Trustee shall subdivide and improve said real property in such manner as may be agreed upon between the Board of Managers and Trustee hereunder.

In Which Event a map of such new Subdivision shall be [90] prepared by the Board of Managers, executed and acknowledged by the Trustee, and filed for record in the office of the County Recorder of Kern County, California, said Trustee being hereby authorized to dedicate to public use all streets and alleys shown on the Map of such new subdivision.

To Sell said real property by lot or lots free of the lien of the Payee hereunder, upon such terms and conditions, to such purchasers, for such prices and payable in such manner as said Trustee may

Exhibit "A"—(Continued)

deem best, provided, however, that the sale prices of said property shall not be less than those agreed upon by said Trustee and the Board of Managers or the selling agent of said land acting under the provisions of Article IX of this Declaration, and

Provided further, however, that the selling price of any parcel of said property shall not be less than that portion of the amount then due the payee hereunder that the area of the parcel so sold bears to the then unsold parcels of all of said land and premises;

To Receive the proceeds arising from the sale of said property.

IV.

To Distribute the cash proceeds arising from the execution of said note or notes or from the sale of lot or lots hereunder as follows:

(1) To the payment of the costs, fees, and expenses of the Trustee hereunder.

(2) To the commission if any, of the authorized selling agent for making the sale of said property which is hereby fixed at ten per cent of the gross selling price;

Provided further, however, that in the event of a sale of any of said property by contract or on installments, there shall be deducted and paid to the agent out of the installments received only one-half of the installment toward said agent's [91] com-

Exhibit "A"—(Continued)

mission from time to time and until his commission has been fully paid.

(3) To the payment of the amount required to procure a release or releases of the lot or lots so sold from the lien of any encumbrance or encumbrances then of record against the same unless such lot or lots be sold subject thereto.

(4) To the payment of such bills approved by the Board of Managers for labor and material, if any, utilized for the improvement of the property covered hereby.

(5) To the Payee, to apply on the note or notes executed by the Board of Managers in connection with this Trust until such note or notes, together with interest and other advances due the Trustee hereunder have been fully paid.

(6) The balance thereof not otherwise required for the purpose of this Trust, to the Beneficiaries as their interest may appear.

V.

The Beneficiaries of this trust at the time of the creation of this trust and the ratio or shares of their respective interests are as follows:

Harry E. Hake	2/28ths
L. I. Weill	2/28ths
A. E. Stegeman	7/28ths
Anita Clare	2/28ths
C. O. Sprague	2/28ths
John P. Brook	2/28ths

Exhibit "A"—(Continued)

Boyd I. Kern	1/28th
Thomas Hope	1/28th
Joe Smith	2/28ths
J. M. Kirby	2/28ths
K. S. McKee	2/28ths
Ruth M. Legerton	1/28th
F. E. Sprague	1/28th
Elizabeth S. Smith	1/28th

VI.

No Sale or Transfer of any beneficial interest hereunder shall be valid or be binding on said trustee until an executed original of the assignment or other instrument evidencing such sale or transfer has been filed with said Trustee, excepting only where such interest may pass or be transferred by Decree or Order of Court, and then only upon satisfactory proof of the regularity and validity of the proceedings in such matter being presented to said Trustee.

If the Property herein described or any portion thereof, or the proceeds or avails thereof, become liable for the payment of any inheritance, income, or other tax, said Trustee is authorized to withhold and pay such tax out of any moneys in its hands for the account of the person whose interests hereunder are so liable, unless such tax shall have been paid by such person or someone else in his behalf.

Provided, if any such tax be not so paid and there are not sufficient moneys in the hands of said trustee under this Trust to pay the same, the Trus-

Exhibit "A"—(Continued)

tee may, at its option (but shall not be obligated so to do), advance a sufficient sum to pay such tax, which advancement, with interest thereon at the rate of seven per cent (7%) per annum from date of advancement to date of repayment, shall constitute a first lien on said property covered hereby, subject only to the incumbrances hereinbefore described.

All of said Trustors hereunder do, severally, well and truly bind themselves to pay, when due, their respective proportions of the principal and interest of all liens, and encumbrances against the property covered hereby, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of said property or the title thereof, and the costs, charges and expenses of this trust, [93] together with all other sums or amounts properly payable by them in connection with this trust, the property herein described or the beneficial interests hereunder.

Said Trustee shall not be required to attend to or procure any insurance upon any building upon any property covered hereby, or to pay or attend to the payment of principal or interest of any debt or incumbrance, or any taxes or assessments levied or assessed against the property covered hereby so long as this Trust shall continue, or to collect or disburse any rentals thereof; but all such services shall be performed and the expenses thereof borne by said Trustors, their successors and assigns.

Exhibit "A"—(Continued)

Nor shall said Trustee be required to commence or defend any suit or suits with respect to said property covered hereby unless request so to do in writing by said Trustors or Payees or Beneficiaries hereunder, or either of them, accompanied by a sum of money sufficient in the judgment of said Trustee, to cover all costs and charges in connection therewith.

It Is Distinctly Understood that all deeds, contracts of sale and other instruments affecting property covered hereby shall be executed solely by said Trustee;

And that all moneys in connection with this Trust (excepting only rentals as hereinbefore provided) shall be paid to said Trustee for distribution in accordance with the provisions herein set forth.

VII.

If Default is made in the payment of said debts to the Trustee or Payee secured hereby, or either or any of them, or any installment of interest on either or any of them, then said Trustee or payee hereunder may declare all sums owing to it and secured hereby immediately due and payable, and shall execute and deliver and record in the office of the Recorder of the County in which the property covered hereby or some part thereof is situated, a notice of such default and breach and of election to cause said [94] property to be sold to satisfy said obligation.

Exhibit "A"—(Continued)

And after three (3) months shall have elapsed following said recordation of said notice, said Trustee—without demand on the Beneficiaries or Payee hereunder or any other person—shall sell the property then covered hereby in such parcels and at such times and places as it shall deem best to accomplish the objects of these trusts, having first given notice of the time and place of such sale or sales, in the manner and for a time not less than that required by law for sales of real property upon execution.

The Trustee, from time to time, may postpone the sale of all or any portion of said property by publication, prior to the date of sale so advertised, a notice of postponement in the same newspaper or newspapers in which the original notice of sale was published, or by public announcement thereof at the time and place of sale so advertised or postponed.

Such sale or sales shall be made in the following manner, namely:

At the time and place of sale fixed as hereinbefore provided the Trustee may sell the property so advertised or any portion thereof either en masse or in separate parcels at its sole discretion, at public auction, to the highest bidder for cash in gold coin of the United States, and, after any such sale and due payment made, shall execute and deliver to the purchaser or purchasers, a deed or deeds conveying the property so sold to such pur-

Exhibit "A"—(Continued)

chaser or purchasers but without covenant or warranty, express or implied, regarding the title or incumbrances, whereupon such purchaser or purchasers shall be let into immediate possession of such property, and all other persons in possession thereof shall be deemed to be tenants at sufferance; and the recitals in each such deed, of any facts or matters affecting the regularity or validity of such sale, shall be conclusive proof of the truthfulness of such recitals, and such deed shall be conclusive against all persons as to all matters recited therein; and the receipt [95] for the purchase money contained in any deed executed to a purchaser as aforesaid, shall be sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money according to the trusts herein contained or otherwise.

The Trustee or Payee or any person on its behalf, or any other person, may purchase at such sale.

Distribution of the proceeds, received by said Trustee, arising from such sale or sales, shall be made by it as follows:—

1st: To the payment of all expenses of such sale, including posting and advertising, and costs, fees, charges and expenses of this Trust; also Trustee's fee for making such sale hereby fixed at Two Hundred Dollars ($200.00) in said Gold coin; which said amounts shall all become due and pay-

Exhibit "A"—(Continued)

able upon receipt by said Trustee of written declaration of default and demand aforesaid.

2nd: To the payment of all sums which may have been advanced by said Trustee for the preservation, maintenance or protection of the property covered hereby, the title thereto, or any beneficial interest hereunder, and not repaid, with accrued interest thereon.

3rd: To the payment to the Payee of all sums then due said Payee hereunder with accrued interest thereon.

4th: And the balance, (if any) to the person or persons legally entitled thereto.

VIII.

This Trust shall not cease or terminate in any event until all of the costs, fees, expenses, liabilities and advances with interest of said Trustee hereunder shall have been fully paid.

IX.

For a period of one year from date and thereafter until the Trustee is otherwise notified in writing by the Board of [96] Managers, Harry E. Hake is hereby designated as the selling agent of said land and when he shall request the Trustee in writing to make a sale of any lot or lots in said subdivision to such person, for cash or on such terms as shall be designated in said order, the Trustee shall proceed to sell by conveyance, or contract for the

sale by agreement of such lots in accordance with such request. All such conveyances or agreements shall be subject to all of the restrictions, reservations, easements and rights of way of record.

X.

The power is hereby vested in the beneficiaries and said Trustee does hereby assent to the express power and right vested in said beneficiaries to revoke this trust in whole or in part at any time after one year from the date hereof by notice of revocation in writing addressed and delivered to said Trustee at least sixty days prior to such revocation taking effect, provided, however, that both the payee and the Trustee shall have been repaid all loans, advances and all other sums of money whatsoever due said Trustee and said payee under this Declaration and under the notes, obligations and other indebtedness hereby secured.

Upon the termination of this trust at the expiration of said sixty days and the repayment of all of said loans, advances and other obligations due the payee and the Trustee hereunder the Trustee shall transfer, convey and deliver to the then beneficiaries hereunder as their interest may appear, the title to all of the said land and premises then vested in the Trustee hereunder, subject, however, to the then existing contracts of sale, agreements, leases, tax liens and assessments, encumbrances and other obligations incurred in reference thereto.

Exhibit "A"—(Continued)

XI.

The costs, fees and expenses of the Trustee hereunder are hereby fixed as follows:

1st: Usual fees for preparing, executing, and recording instruments, and issuing Guarantee showing title to the real [97] property covered hereby vested in said Trustee; together with expense of internal revenue or such other tax as may be imposed by law upon all instruments necessary for execution hereunder; also proper compensation for preparing income and other tax reports required by law.

2nd: One Hundred Dollars ($100.00) for the drawing and execution of this Declaration and the acceptance of this trust. Should this trust not terminate within one year from the date hereof, then said Trustee shall receive an additional sum of Twenty-five dollars ($25.00) for each year, or fractional year, thereafter.

3rd: One per cent (1%) of the cash consideration paid upon the outright purchase of any property covered hereby or of the initial or down payment made by any purchaser under contract or agreement of sale; and 2% of the installments of principal and interest collected under agreements or contract or sale on any property covered by this Declaration.

4th: And reasonable compensation for any service rendered by said Trustee in the execution of this

Exhibit "A"—(Continued)

trust for which the costs, fees and expenses are not herein provided.

5th: The sum of Twenty-five Dollars ($25.00) for the final closing, distributing and settlement of this trust.

In Witness Whereof the parties hereto have hereunto set their hands this 28th day of January, 1926, at Bakersfield, California.

Harry E. Hake	F. F. Sprague
L. I. Weill	Joe Smith
A. E. Stegeman	J. M. Kirby, M.D.
Anita Clare	K. S. McKee
C. O. Sprague	Elizabeth S. Smith
John P. Brooke	Thomas Hope
Boyd Kern	Ruth M. Legerton

SECURITY TRUST COMPANY,
A CORPORATION,
As Trustor.

By C. C. LEGERTON,
Its Assistant Trust Officer. [98]

EXHIBIT "B"

HOMECREST SUPPLEMENTAL AGREEMENT

Whereas, by agreement dated on or about the 28 day of January, 1926, by and between Harry E. Hake, L. E. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd T. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, as Trustors, and Security Trust Company, a corporation of Bakersfield, California, as Trustee, a Declaration of Trust was made whereby said Security Trust Company acknowledged the holding in trust upon the terms and conditions therein specified, of the following real property situate in the County of Kern, State of California, particularly described as follows, to-wit:

The Southwest Quarter (SW¼) of Section Twelve (12), in Township Twenty-nine (29) South, Range Twenty-seven (27) East, M.D.B. & M.;

And Whereas, Bank of America National Trust and Savings Association is now the successor to said Security Trust Company, and as such successor has succeeded to all the rights, powers, duties and liabilities conferred or imposed upon said Security Trust Company under the terms of said Declaration of Trust; and

Whereas, Paragraph II of said Declaration of Trust provides as follows:

"The Trustee, hereinafter sometimes called the

Payee, shall hold said property as Security for the payment to it of the sum of Fourteen Thousand dollars ($14,000.00) as evidenced by that certain promissory note signed by the Board of Managers dated January 28, 1926, together with interest thereon as therein provided, and for the payment to said Payee for such other loans and advances as may be made by the Payee during the continuance of this [99] Trust to the then acting Board of Managers as evidenced by any promissory note or notes executed by two or more members of said Board, together with interest thereon as therein provided. Each Trustor agrees that he, his successors and assigns, shall be severally liable to the Payee for payment of the balance due on said note or notes in the proportion set opposite his name as beneficiary hereunder."

And Whereas, said Bank of America National Trust and Savings Association may, pursuant to the provisions of said Paragraph II, make other loans and advances under said Declaration of Trust evidenced by promissory note or notes executed by the Board of Managers as created by said Declaration of Trust, upon the condition, however, that the beneficiaries under said Declaration of Trust shall agree to become personally liable to said Bank of America National Trust and Savings Association for such loans or advances in the proportion that the interest of each beneficiary bears to the total of the beneficial interests held by said beneficiaries.

Now, Therefore, it is hereby agreed as follows, to-wit:

1. That said Bank of America National Trust and Savings Association may make such loans and advances, as in its discretion it may determine, to said Board of Managers, to be evidenced by promissory note or notes executed by said Board of Managers.

2. That the repayment of said loans or advances shall be secured by said Declaration of Trust and enforced according to the terms and conditions set forth in said Declaration of Trust.

3. That the said Board of Managers may execute a promissory note or notes evidencing said loans or advances and specifying the time and manner of repayment, and the interest thereon, and that said notes may be renewed from time to time as agreed upon [100] between Bank of America National Trust and Savings Association, and said Board of Managers.

4. That each of the undersigned being present beneficiaries under said declaration of trust shall be personally liable to said Bank of America National Trust and Savings Association for said loans or advances to the extent of the fractional interest of each beneficiary as set opposite the signature of each beneficiary on this agreement, and that the extent and manner of such liability shall be determined by the promissory note or notes executed by said Board of Managers to evidence said loans or advances or any renewals thereof.

5. That said personal liability of the undersigned beneficiaries may be enforced by said Bank of America National Trust and Savings Association without resort to the foreclosure proceedings provided for in said Declaration of Trust.

6. The personal liability hereby authorized shall be a several liability and its creation and enforcement shall be several and shall not be dependent upon the execution of this agreement by all the persons, beneficiaries under said Declaration of Trust at the time such loans or advances are made by Bank of America National Trust and Savings Association, but shall be enforceable only against such signatory beneficiaries as are beneficiaries under said Declaration of Trust, as shown on the records of said Bank of America National Trust and Savings Association, in the manner provided by said Declaration of Trust, and subsequent assignees and transferees or successors of any of the signatory beneficiaries, by the subscription to and execution of this agreement shall become parties hereto as if originally subscribed to and executed by them.

In Witness Whereof the parties hereto have hereunto set their hands this 23rd day of June, 1937.

Signed by:

F. E. Sprague	1/28th
L. I. Weill	2/28ths
Boyd Kern	1/28th
Joe Smith	2/28ths
Elizabeth S. Smith	1/28th
Transferred to Stegeman	

E. H. Clare	2/28ths
C. O. Sprague	2/28ths
Thomas Hope	1/28th
J. M. Kirby, M.D.	2/28ths
John P. Brooke	4/28ths
Louis Williams	1/28th
A. E. Stegeman	11/28ths

(Here follows Exhibit B-2, Claim, which is a part of Exhibit A in the Complaint, and is reproduced at page 24 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 901(a)(2) of the Revenue Act of 1938 and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement date the 23rd day of June, 1937, are attached hereto, marked "Exhibit A" and "Exhibit B," respectively, referred to, and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property [104] conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest, and therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deal of trust to secure the repayment of a loan made by the trustee, and since the characteristics of claimant, as indicated by the

above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation. [175]

Bank of America National Trust and Savings Association, trustee, under said declaration of trust, duly filed an income and excess-profits tax return for claimant for the calendar year 1938. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street, Los Angeles, California. [106]

(Here follows Exhibit C-1, Claim, which is a part of Exhibit B in the Complaint, and is reproduced at page 48 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 3797(a) (3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B" respectively, and attached to a claim for refund of income and excess-profits taxes filed by claimant for the period January 1, 1938 to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advance as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to

portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making [108] disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries

did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the [109] trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed an income and excess-profits tax return for claimant for the calendar year 1939. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant

from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY
810 South Spring Street,
Los Angeles, California

(Here follows Exhibit D-1, Claim, which is a part of Exhibit C in the Complaint, and is reproduced at page 54 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 3797(a) (3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B" respectively, and attached to a claim for refund of income and excess-profits taxes, filed

by claimant for the period January 1, 1938 to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said [112] declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the

title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the re-

payment of a loan made by the trustee and since the characteristics of claimant, as indicated by [113] the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed an income and excess-profits tax return for the calendar year 1940. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as Trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY
810 South Spring Street
Los Angeles, California

(Here follows Exhibit E-1, Claim, which is a part of Exhibit D of the Complaint, and is reproduced at page 60 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 1001(a) (2) of

the Revenue Act of 1936 and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B" respectively, and attached to a claim for refund of income and excess-profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following:

holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said declaration of [116] trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the bene-

ficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by [117] the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year ending June 30, 1938. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY
810 South Spring Street
Los Angeles, California

(Here follows Exhibit F-1, Claim, which is a part of Exhibit E of the Complaint, and is reproduced at page 65 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 901(a) (2) of the Revenue Act of 1938 and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd T. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed

concurrently herewith, marked "Exhibit A" and "Exhibit B" respectively, and attached to a claim for refund of income and excess-profits taxes, filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyance of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the [120] said declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revoca-

tion of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by [121] trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year ending June 30, 1939. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY

810 South Spring Street

Los Angeles, California

(Here follows Exhibit G-1, Claim, which is a part of Exhibit F in the Complaint, and is reproduced at page 71 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 3797(a)(3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors and the Security Trust Company, a corporation, trustee, which was subsequently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B," respectively, and attached to a claim for refund of income and excess-profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be

made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making disbursements of funds in accordance with the provisions of the said [124] declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not or-

ganize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest, and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs, charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by [125] the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year

ending June 30, 1940. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated as Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 South Spring Street, Los Angeles, California. [126]

(Here follows Exhibit H-1, Claim, which is a part of Exhibit G in the Complaint, and is reproduced at page 77 of this Record.)

Claimant was not an association coming within the meaning and intent of Section 3797(a)(3) of the Internal Revenue Code and therefore was not taxable as a corporation.

A declaration of trust was executed under date of January 28, 1926, by and between Harry E. Hake, L. I. Weill, A. E. Stegeman, Anita Clare, C. O. Sprague, John P. Brooke, Boyd I. Kern, Thomas Hope, Joe Smith, J. M. Kirby, K. S. McKee, Ruth M. Legerton, F. E. Sprague and Elizabeth S. Smith, trustors, and the Security Trust Company, a corporation, trustee, which was subse-

quently succeeded by Bank of America National Trust and Savings Association as trustee. Copies of said declaration of trust and a supplemental agreement dated the 23rd day of June, 1937, have been filed concurrently herewith, marked "Exhibit A" and "Exhibit B," respectively, and attached to a claim for refund of income and excess-profits taxes filed by claimant for the period January 1, 1938, to December 31, 1938. Said exhibits are hereby referred to and by reference made a part of this claim.

The said declaration of trust is in the nature of a deed of trust to secure the repayment to the trustee of a sum of $14,000.00 as evidenced by a promissory note dated January 28, 1926, together with interest thereon, and for the repayment to the trustee for such other loans and advances as might be made by the trustee during the continuance of the trust to the Board of Managers acting for and on behalf of all of the beneficiaries of the trust.

The duties of the trustee were ministerial in nature only and consisted entirely of the following: holding title to the property conveyed in trust by the beneficiaries; making conveyances of title to portions of the property sold in accordance with the directions of the selling agent who was appointed by the Board of Managers, consisting of certain of the beneficiaries; receiving the proceeds arising from the sale of said property; and making [128] disbursements of funds in accordance with the provisions of the said declaration of trust and under the direction of the Board of Managers.

The beneficiaries were the equitable owners of the real property conveyed in trust to the trustee and their beneficial interests were not merely personal claims. The trust agreement provided for revocation of the trust and in such event the trustee would transfer, convey and deliver to the then beneficiaries under the trust as their interest might appear, the title to all of the real property then vested in the trustee.

Claimant was not possessed of features which would make it analogous to a corporation. The trust agreement made no provision for the appointment of successor trustees to insure the continuance of the trust. Claimant had no name as an entity, there were no officers except as the managers might be so considered and they did not organize. There was no provision for taking in additional capital or members. The trust agreement provided the sole evidence of the interest of the several beneficiaries, there being no shares, certificates or other evidence of interest and, therefore, the interests of the beneficiaries were not readily or conveniently transferable. Limited personal liability of the beneficiaries did not exist for the reason that the trust agreement expressly made the beneficiaries personally liable for their respective proportions of the principal and interest of all liens, and encumbrances against the property covered by the trust agreement, all taxes, insurance, assessments, liens, or charges or expenses necessary or proper for the preservation, maintenance or care of the property or the title thereof, and costs,

charges and expenses of the trust, together with all sums or amounts properly payable by them in connection with the trust, the property covered by the trust or their beneficial interests in the trust.

Inasmuch as the said declaration of trust was in the nature of [129] a deed of trust to secure the repayment of a loan made by the trustee and since the characteristics of claimant, as indicated by the above-stated facts, are not typical of the characteristics of a corporation, then claimant was erroneously taxed as a corporation.

Bank of America National Trust and Savings Association, trustee under said declaration of trust, duly filed a capital stock tax return for the year ending June 30, 1941. The said declaration of trust has not been revoked and said Bank of America National Trust and Savings Association is still acting as trustee thereunder.

CERTIFICATE

I hereby certify that I prepared the accompanying claim for refund for and on behalf of claimant from information obtained from Bank of America National Trust and Savings Association, trustee, and to the best of my knowledge and belief all facts stated therein are true.

Dated at Los Angeles, California, this 26th day of January, 1942.

LLOYD G. RAINEY,
810 Suth Spring, Street, Los Angeles, California. [130]

EXHIBIT I

Treasury Department
Washington

August 10, 1942.

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue and Refer to IT:C1:CC:Rej Homecrest Tract, c/o Bank of America National Trust & Savings Ass'n., Bakersfield, California.

In re: Claims for refund of $2,059.50 and $1,856.54. For the years 1938 and 1939.

Sirs:

Reference is made to revenue agent's report dated April 27, 1942, with respect to your tax liability. A copy of the report was forwarded to you, and you were informed that the claim or claims for refund indicated above would be disallowed.

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

Respectfully,
GUY T. HELVERING,
Commissioner.

By T. MOONEY,
Deputy Commissioner. [131]

EXHIBIT J

Treasury Department
Washington

Oct. 1, 1942.

Office of Commissioner of Internal Revenue.

Address reply to Commissioner of Internal Revenue and refer to IT:C1:CC:Rej Homecrest Tract Bank of America, National Trust and Savings Association, Bakersfield, California.

In re: Claim for refund of $1,147.43 for the year 1940.

Sirs:

Reference is made to claim or claims, referred to above, filed by you for the refund of income taxes.

By a certificate of Overassessment you were advised of an allowance on Schedule of Overassessments numbered IT-82516 for the taxable year referred to, and that to the extent your claim was disallowed in connection with such Certificate of Overassessment notice would be issued.

In accordance with the provisions of section 3772 (a)(2) of the Internal Revenue Code, this notice of disallowance of your claim or claims, to the extent not previously allowed, is hereby given by registered mail.

Respectfully,
GUY T. HELVERING,
Commissioner.
By T. MOONEY,
Deputy Commissioner. [132]

EXHIBIT K

Treasury Department
Washington

Sept. 19, 1942.

Office of Commissioner of Internal Revenue.

Address Reply to Commissioner of Internal Revenue and refer to MT:CST:JK 566782 Cls. CST-174195-6-7-8, Bank of America, Bakersfield, California.

Attention: Trust Department.

In re: Homecrest Tract.

Gentlemen:

Consideration has been given to your claims for the refund of capital stock tax paid in behalf of the above-named trust for the taxable years 1938 to 1941, inclusive, amounting to $411.50.

The claims are based on the ground that Homecrest Tract is a trust and not an association taxable as a corporation.

The Bureau has ruled that the above trust is an association taxable as a corporation for income tax purposes. Since the status of the taxpayer for income tax purposes governs its status for capital stock tax purposes, the claims for refund on the ground that the taxpayer is not taxable as a corporation are, accordingly, rejected.

Respectfully,

GUY T. HELVERING,
Commissioner.

By D. S. Bliss,
Deputy Commissioner.

Registered Mail.

cc-Los Angeles, California. [132½]

In the Southern Division of the United States District Court, in and for the Northern District of California.

Before: Hon. Michael J. Roche, Judge.

No. 23,580-R

HOMECREST TRACT, BANK OF AMERICA, NATIONAL TRUST & SAVINGS ASSOCIATION, Trustee,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Tuesday, May 22, 1945
1:00 o'clock p.m.

Counsel Appearing: For Plaintiff: J. E. Blum, Esq., 810 So. Spring St., Los Angeles, Calif. For Defendant: William E. Licking, Esq., Assistant United States Attorney.

The Clerk: Homecrest Tract vs. United States.

Mr. Blum: Ready.

Mr. Licking: Ready.

The Court: Proceed.

Mr. Blum: This is an action for the recovery of income excess tax on the capital stock of the plaintiff, collected from plaintiff by defendant, on the theory the trust involved in this action had the attributes of a corporation, and was an association taxable

* Page numbering appearing at foot of page of original Reporter's Transcript.

as a corporation. It is the plaintiff's contention that it contains none of the attributes which the Supreme Court laid down in Morrissey v. Commissioner, 296 U. S., and companion cases, wherein the Supreme Court laid down five principles in determining whether a group was an association taxable as a corporation. I assume that the case will probably be submitted on briefs, and I shan't go into the five points which the Supreme Court laid down. They will be taken up at length in the briefs.

It is the contention of the plaintiff that they contain but one of those attributes. That is one that is not common only to trusts. These facts, in the main, have been stipulated—I believe the stipulation is to be handed to the Court.

Mr. Licking: Yes, I will hand it at this time.

Mr. Blum: The Court will note in going through the stipulation that we have attached to the stipulation all of the exhibits which are material in this action, at least copies of them, and have stipulated they may be treated for all purposes of the action as the originals. The defendant has filed as of Saturday, I believe, a new matter, an amended answer.

Mr. Licking: I understand it is stipulated at this time that the amendment to the answer which sets up a setoff or counterclaim may be filed. [134]

Mr. Blum: Correct.

Mr. Licking: It is further stipulated on the part of counsel that the new matter set up in the amendment to the answer is deemed to have been

denied, as though a formal pleading were filed with the court to that effect.

Mr. Blum: Except for paragraph VI., which is contained in the stipulation and which is deleted and——

Mr. Licking: Paragraph VI., which appears on pages 4 and 5, your Honor; that was deleted.

The Court: It is crossed out here.

Mr. Licking: Yes. That was deleted by agreement of counsel.

Mr. Blum: The only testimony involved in the case will be a few questions to cover the matters which were set up in the paragraph VI.

Mr. Licking: I take it it will be further stipulated, to complete the record, that a recomputation of the taxpayer's income tax liability for the taxable years 1938 to 1940, inclusive, based on the assumption that plaintiff was properly taxable as a pure trust and not as an association taxable as a corporation, disclosed income tax liability for the year 1938 in the amount of $400.01, no income tax liability for the years 1939 and 1940.

Briefly, your Honor, the new matter set up in the amended answer is this: Counsel has explained the theory on which the [135] tax was assessed, that is, that the trust was an association which was taxable as a corporation under the provisions of the Internal Revenue statutes, and the new matter set up, briefly, was that if the Court should hold that it was a trust, and a taxable trust, that for the year of 1938 there will be an offset in the amount of $400.01. There is some legal question to the ex-

tent even if it is a trust it is a taxable trust, and that we can handle in the briefs.

Mr. Blum: We claim it is not taxable as a trust under section 166, but as to the point of the $400.01, if the Court decides the trust should have paid a tax as a pure trust, then the amount of tax set up is correct, which would mean it would have to be paid for the year 1938 in that amount.

The Court: I would have to conclude it was a trust.

Mr. Blum: You would have to conclude it was a trust and that it was taxable as a trust, and not exempt under the section 166, which we will later set up in our brief.

The Court: Did this association have any tax returns heretofore?

Mr. Blum: It filed a fiduciary return for the years prior and as of the year 1937 the trustee received a letter from the Commissioner that henceforth they were considered to be an association taxable as a trust, and from that date on they filed regular returns, and for the year 1938 they did not file a fiduciary return, which had it been filed would have [136] shown an income of, roughly, $11,000, and distribution of $4200, which means that unless the entire income is allocated to the beneficiaries, whether or not distributed and taxable to the beneficiaries, it should have paid a tax, the trust should have paid a tax. Our contention is it was not taxable as a trust, even as a pure trust. Anything further?

Mr. Licking: Nothing further.

R. C. HINDERLITER,

called as a witness by plaintiff; sworn.

The Clerk: Will you state your name to the Court?

A. R. C. Hinderliter.

Direct Examination

By Mr. Blum:

Q. What is your business or occupation, Mr. Hinderliter?

A. I am an assistant trust officer of the Bank of America in Bakersfield.

The Court: Where?

A. Bakersfield.

Mr. Blum: Q. As such, have you had any connection with trust SU142, commonly referred to, I believe, in your trust department, as the Homecrest Tract?

A. I have.

Q. Did you have charge of that trust as the trust officer? A. Yes.

Mr. Licking: That is the trust set out in Exhibit A?

Mr. Blum: That is the trust involved in this action set up as Plaintiff's Exhibit A?

A. Yes. [137]

Q. Did the trust have a name as an entity?

Mr. Licking: It seems to me that that is objectionable, on the ground it calls probably for a mixed matter of law, that is, as to its being an entity.

Mr. Blum: Q. Did the trust have a name?

(Testimony of R. C. Hinderliter.)

A. The one that we gave it as of our number, our identifying name only.

Q. You mean by that the name Homecrest Tract? A. That's right.

Q. Were there any contracts, bills of sale, or other instruments made in the name of the trust as the Homecrest Tract? A. No.

Q. Where were the bills of sale or deeds made?

A. They were issued and signed by the bank; just the bank, without any trustee designation, at all.

Q. Did this trust have any officers, with the exception of the board of managers, if it might be so construed? A. No.

Mr. Licking: In other words, you mean it didn't have any officers other than those set up in Exhibit A?

Mr. Blum: Yes.

The Witness: A. No.

Q. Did the board of managers ever organize?

A. No.

Mr. Licking: That is hearsay. I move it be stricken. He was not a member of the board of managers.

Mr. Blum: Q. Do you, as trustee, and in your capacity as being in charge of this trust, know of your own knowledge whether the board of managers ever organized?

Mr. Licking: How can he? [138]

Mr. Blum: I am asking him.

(Testimony of R. C. Hinderliter.)

Mr. Licking: It calls for a matter that is obviously immaterial.

Mr. Blum: I asked him if he knew of his own knowledge whether it ever organized or not.

The Witness: They have not, to my knowledge.

Mr. Blum: Q. Well, do you know—will you say whether you know?

A. No, I couldn't say.

Q. Were any shares or certificates or other evidence of interest in the trust ever issued?

A. No.

Mr. Licking: That answer is of your own knowledge, you know that to be a fact? A. Yes.

Mr. Lieking: I don't want to clutter the record——

The Witness: That's right.

Mr. Blum: Q. Do you know of your own knowledge whether the trust had a seal?

A. No.

Q. You don't know of your own knowledge, or you do do know?

A. I know there was no seal.

Q. Did the trust have bylaws? A. No.

Q. Did the trust have any minute books or stock ledgers? A. No.

Q. Or stock certificate books? A. No.

Q. Or any books in lieu of any such books?

A. No.

Q. Did the trust have an office? A. No.

Q. Did it operate right from your trust department of the bank? A. That's right. [139]

(Testimony of R. C. Hinderliter.)

Q. Was that the place of operation?

A. Yes.

Q. Did the trust have any employees other than the board of managers and the selling agents?

A. No.

Q. Did the trustee, the Bank of America, ever seek advice or instructions from the beneficiaries with respect to their actions?

Mr. Licking: That calls for hearsay, and I object on that ground.

Mr. Blum: He was the one in charge of the trust.

Mr. Licking: Well, if he is——

Mr. Blum: Q. Do you know, or did you, as being the trust officer in charge of the trust, ever seek advice or instruction from the beneficiaries with respect to any matters concerning the trust?

A. Yes.

Q. Do you know whether the Bank of America would have loaned the trustors of this trust the money which is evidenced by the promissory note which this trust secures, without the security of the deed of trust?

Mr. Licking: That question we object to on the first ground it is argumentative, and secondly it calls for his conclusion as to what the Bank of America would have done.

The Court: Sustained.

Mr. Blum: Q. Was there any discussion between the trustee, and more particularly you, as representative of the trustee, and the trustors

(Testimony of R. C. Hinderliter.)

when the trust was drawn, as to the powers [140] of the trustee with respect to the trustee signing the contracts for the sale of the property, and of the deeds.

Mr. Licking: I object to that as calling for hearsay; secondly, that the trust indenture explains itself better than anything else as to any agreement between the representative of the bank and the trustors. It would be immaterial in the case and inadmissible.

Mr. Blum: I am not asking for the agreement they had. I asked if there was any discussion at the time the trust was created.

Mr. Licking: It is immaterial.

Mr. Blum: In other words, a trustor does not just say, "You go out and draw a trust and hand it to me and I will accept it." I am leading up to a particular power, one of the powers which appeared in the trust.

The Court: Pardon me just a moment. Did you, yourself, draw this trust?

The Witness: A. I did not.

Mr. Blum: Q. Did you have any discussion with the trustors with respect to the drawing of the trust?

Mr. Licking: I object to that as immaterial, and hearsay. The trust agreement speaks for itself.

Mr. Blum: I think we have the right to show the circumstances leading up to the trust. We cannot show any agreement at variance—this is

(Testimony of R. C. Hinderliter.)

not parole evidence. We can show the [141] reason why a certain power was put into the trust.

The Court: The trust will have to speak for itself. Any conversation with any of the trustors or the trustee would not vary the terms of this written instrument.

Mr. Blum: It is not a question of varying the terms, your Honor. It is to show the reason why the terms are as they are. We have a right to show the intent and the reason, I think, behind the powers. We are not attempting to vitiate any of the powers.

The Court: Is there any question about what was intended here?

Mr. Blum: I don't think it has been brought up at all by Mr. Licking.

Mr. Licking: "To convey real property to trustee.

"2. To execute a supplemental agreement, two copies of the proposed agreement"——

It seems to me they speak pretty well for themselves, your Honor. I repeat my objection that the document, itself, is not ambiguous. I don't know any variance in it. It is not ambiguous. If there is any phrase that is ambiguous I might be disposed to agree with counsel that parole evidence might be resorted to to explain any ambiguity, but to explain why the trust was drawn, the trust speaks for itself.

Mr. Blum: Apparently I have not made myself clear. The trust states why it was formed. The

(Testimony of R. C. Hinderliter.)

trust says this trust [142] was formed as security for a promissory note of even date executed by the trustors in favor of the trustee, or words substantially to that effect. However, there was one power in the trust which provided that the trustee shall have the right to sign contracts of sale for this property, or portions of it. I think I have the right to show why that power was put in. We are not trying to say the trustee didn't have it. We are not trying to say there is any variation in it, but I do think we have a right to show why a power was put in.

The Court: What is the purpose of the offer?

Mr. Blum: The purpose of the offer is to show it would have been very cumbersome for ten or twelve people to have to sign every bill of sale for a piece of property. It would have broken down the confidence of anyone who wanted to buy a piece of property, that they would have to be able to get a deed from ten or twelve people who might be scattered to the four corners of the United States.

Mr. Licking: I will admit that is a good argument, but counsel is supposed to make that argument in his brief, or to the court at a later date. An additional ground of objection is he is seeking to prepare an argument by the testimony of a witness here as to a reason——

Mr. Blum: It is not a matter of argument. The fact is there were discussions at the time of the creation of the trust as to the putting in of this power.

The Court: Assuming he had a discussion with

(Testimony of R. C. Hinderliter.)

one of these trustors, how would that vary the terms of this written instrument, itself?

Mr. Blum: It wouldn't vary the terms, at all, your Honor. It would simply, as we see it, add to plaintiff's contention that the trust is not taxable as an association, and the cases have permitted that to come in, as shown by the decision in A. A. Lewis vs. The Commissioner, where the Supreme Court permitted evidence to go in to show why the trust was formed.

Mr. Licking: But this trust shows why it was formed.

The Court: So he may have a record, I will allow the testimony to go in subject to your motion to strike, and over your objection.

Mr. Blum: Very well.

Q. Were any such conversations had, Mr. Hinderliter, with respect to the giving of the power to the trustee to sign contracts of sale?

A. I cannot answer that, because I was not the trust officer at that time.

Mr. Blum: No further questions, from this witness.

Cross Examination

Mr. Licking: Q. When you say the trust had no office, you mean it had no office other than the bank? A. That's right.

Q. It used the bank for meetings?

A. No; we had no meeting that I know of.

Q. It had no meetings?

A. That's right. [144]

(Testimony of R. C. Hinderliter.)

Q. So far as you know?

A. That's right.

Mr. Licking: I think that is all.

LAWRENCE I. WEILL,

called as a witness by the plaintiff sworn.

The Clerk: Will you state your name?

A. Lawrence I. Weill.

Direct Examination

Mr. Blum: Q. Mr. Weill, are you the L. I. Weill named as one of the trustors and one of the beneficiaries and an original member of the board of managers in Plaintiff's Exhibit A, being the trust? A. I am.

Q. There set out as L. I. Weill? A. Yes.

Q. Did any conversation occur with a representative of the Bank of America at the time of the creation of this trust at which you were present, and other trustors were present, with respect to the placing in the bank of the power that the trustee might sign contracts of sale for the sale of any of the property?

Mr. Licking: That is objected to as immaterial.

Mr. Blum: Well, it goes in on the same understanding—I am willing to stipulate it goes in on the same ruling the court made before.

The Court: I will allow it to come in subject to a motion to strike, and I will overrule the objection, so you may have a record.

(Testimony of Lawrence I. Weill.)

The Witness: I cannot recall any specific meeting at which [145] that occurred excepting that was one of the purposes for which the trust was formed.

Mr. Licking: I object. The answer is not responsive.

The Court: Sustained.

Mr. Licking: I move it be stricken.

The Court: He had no conversation.

Mr. Licking: I move it be stricken.

The Court: Yes.

Mr. Blum: I will stipulate it may be; it is not responsive. I am not asking if you recall any particular conversation, Mr. Weill. Were there any conversations at which you were present during which this point was discussed?

Mr. Licking: I object to that as too indefinite and uncertain, and considerably leading and suggestive.

The Court: Read the question.

(The question was read by the reporter.)

The Court: You may answer the question "Yes" or "No."

Mr. Licking: The further objection is on the ground no foundation is laid.

The Court: Well, I limited the answer. You may answer that question "Yes" or "No."

The Witness: I cannot answer it "Yes" or "No," your Honor.

The Court: Let the answer stand.

Mr. Blum: No further questions. [146]

Mr. Licking: I have no questions.

Mr. Blum: Plaintiff rests.

Mr. Licking: It seems to me, your Honor, there is no essential factual controversy, and that the written stipulation heretofore filed and the oral stipulation made here give the Court all the facts necessary for its decision in the matter. With that in mind the Government will rest its case.

The Court: For the purpose of the record, so I will have it in mind, you might repeat the question for decision in this case.

Mr. Licking: Well, the question, I would prefer to have counsel make the statement.

The Court: I am interested, and it will be helpful to me whenever I reach this. I may not reach it for a month. How much time do you want for briefs?

Mr. Blum: We have tentatively agreed, subject to your Honor's view, on 20, 20 and 10.

The Court: Well, I might forget all about it by that time, but if I have a record here on the question finally to be determined by this court it will be helpful.

Mr. Blum: The question finally to be determined by this court is whether or not this trust is an association taxable as a corporation, which in turn would upon the five points set forth in Morrissey vs. Commissioner, 296 United States, 344; [147] 56 Sup. Ct. 289; 80 Law Ed. 263. In that case the Court stated that the five primary essentials of a corporation are, first, title to the property held by the trustee as a corporate body with provision for succession; 2, selection of managers; 3, security for

termination or interruption by the death of owners of beneficial interests; 4, facility for transferal of beneficial interests; 5, limitation of the personal liability of the participants.

The Court: Were they dealing with a trust indenture there?

Mr. Blum: Yes.

(After oral discussion the matter was agreed to be briefed in 10, 20, and 5 days.) [148]

[Endorsed]: Filed July 11, 1945. [149]

[Title of District Court and Cause.]

NOTICE

To Messrs. Lloyd G. Rainey and Paul C. Jones, 810 South Spring Street, Los Angeles 14, California. Frank J. Hennessy, Esq., United States Attorney, Post Office Building, San Francisco 1, California.

You Are Hereby Notified that on August 3, 1945, Judge Michael J. Roche Ordered that there be entered in the above-entitled case, upon findings of fact and conclusions of law, Judgment in favor of plaintiff and against defendant in the sum of $5,474.97, together with interest thereon as provided by law from the dates of payment thereof and it is further Ordered that plaintiff recover from defendant its costs therein expended.

C. W. CALBREATH.
Clerk, U. S. District Court.

San Francisco 1, California, Aug. 4, 1945. [150]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on regularly to be heard on the 22nd day of May, 1945, before the Honorable Michael J. Roche, United States District Judge, a jury having been waived, plaintiff appearing by its attorneys, Lloyd G. Rainey, J. Everett Blum and Paul C. Jones, by J. Everett Blum, and defendant appearing by its attorneys, Frank J. Hennessy, United States Attorney and William E. Licking, Assistant United States Attorney, by William E. Licking, and the case having been tried on a stipulation of facts and oral testimony, the Court, being fully advised in the premises and the matter having been submitted, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The stipulation of facts together with exhibits "A" to "K", inclusive, referred to therein, filed herein on or about the 22nd day of May, 1945, are, and each of them is, found as facts in this case and by reference each is incorporated herein as fully as though set out at length herein. [151]

2. The trust referred to in Paragraph II of the stipulation of facts (Exhibit A) had no offices.

3. Said trust had no officers, except as the Board of Managers might be so construed to be.

4. Said trust issued no shares, or certificates, or other evidence of interest therein and had no stock ledger, or stock certificate book, or any books in lieu thereof.

5. Said trust has no seal, by-laws or minute book.

6. Said trust had no employees other than the Board of Managers and selling agent.

7. Said trust had no meetings.

CONCLUSIONS OF LAW

1. The trust created on or about the 28th day of January, 1926, and referred to in Paragraph II of the stipulation of facts (Exhibit A) was, and is, not an association taxable as a corporation within the meaning of Section 901 (a) (2) of the Revenue Act of 1938 and Section 3797 (a) (3) of the Internal Revenue Code.

2. The income of said trust is not taxable to said trust under Section 162 of the Internal Revenue Code.

3. This Court has jurisdiction of the subject matter and of the parties.

4. All the conditions precedent to the institution of this action have been complied with by the plaintiff.

5. Plaintiff is entitled to judgment against the defendant in the sum of $5,474.97, together with interest thereon as provided by law from the dates

of payment as follows: On $2,000.94 from March 15, 1939; on $58.56 from July 8, 1940; on $1,856.54 from March 15, 1940; on $1,147.43 from March 15, 1941; on $50.00 from July 26, 1938; on $75.00 from August 18, 1939; on $99.00 from July 30, 1940; on $187.50 from July 30, 1941. [152]

6. Plaintiff is entitled to recover costs against the defendant.

Dated: September 19th, 1945.

/s/ MICHAEL J. ROCHE,

Judge of the Above-Entitled Court.

Approved as to form:

/s/ FRANK J. HENNESSY,

United States Attorney.

/s/ W. E. LICKING,

Assistant United States Attorney.

[Endorsed]: Filed Sept. 16, 1945. [153]

In the District Court of the United States
Northern District of California, Southern Division

No. 23580-R

HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, TRUSTEE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT FOR REFUND OF TAXES

The above entitled matter having come on regularly to be heard on the 22nd day of May, 1945, before the Honorable Michael J. Roche, United States District Judge, sitting without a jury, plaintiff appearing by its attorneys, Lloyd G. Rainey, J. Everett Blum and Paul C. Jones, by J. Everett Blum, and defendant appearing by its attorneys, Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, by William E. Licking, the Court having made its Findings of Fact and Conclusions of Law:

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

That plaintiff have and recover of and from defendant the sum of $5,474.97, together with interest thereon as provided by law from the dates of payment as follows: On $2,000.94 from March

15, 1939; on $58.56 from July 8, 1940; on $1,856.54 from March 15, 1940; on $1,147.43 from March 15, 1941; on $50.00 from July 26, 1938; on $75.00 from August 18, 1939; on $99.00 from July 30, 1940; and on $187.50 from July 30, 1941; making a total interest charge [154] to and including August 15, 1945, in the sum of $1,809.09, together with a daily rate of interest thereafter of $.978726.

It Is Further Ordered that plaintiff recover from defendant its costs herein incurred and expended in the sum of $.....

Dated: September 19th, 1945.

/s/ MICHAEL J. ROCHE,
Judge of the Above-Entitled Court.

Approved as to Form:

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ W. E. LICKING,
Assistant United States Attorney.

[Endorsed]: Filed Sept 19, 1945. [155]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To the United States of America and to Frank J. Hennessy, Esq., United States Attorney:

You and Each of You Will Please Take Notice: That judgment in the above entitled matter was

entered of record on September 19, 1945, in the office of the clerk of the above-entitled court.

Dated: September 25, 1945.

LLOYD G. RAINEY,
J. EVERETT BLUM and
PAUL C. JONES,
By /s/ J. EVERETT BLUM,
Attorneys for Plaintiff. [156]

(Acknowledgment of receipt of copy of Notice of Entry of Judgment.)

[Endorsed]: Filed Oct. 3, 1945. [157]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the defendant, United States of America, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment made and entered herein September 19, 1945, in favor of the above named plaintiff.

Dated: December 17, 1945.

/s/ FRANK J. HENNESSSY,
United States Attorney.
/s/ WILLIAM E. LICKING,
Assistant United States
Attorney.
Attorneys for Defendant.

[Endorsed]: Filed Dec. 17, 1945. [158]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING THE ACTION

The defendant herein having this day filed Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment made and entered herein September 19, 1945, now upon the application of said defendant and appellant, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and Good Cause Appearing Therefor, it is hereby Ordered that said defendant and appellant have and hereby is given to and including March 16, 1946, for filing the record on appeal and docketing the action with said Appellate Court.

Dated: December 17, 1945.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Dec. 17, 1945. [159]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED ON BY DEFENDANT ON APPEAL

The defendant having taken an appeal on December 17, 1945, to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment made and entered herein by the United States District Court for the Northern District of California, Southern Division, on September 19, 1945,

hereby designates the following points to be relied on in the prosecution of said appeal:

The District Court erred:

1. In concluding that the trust created on or about January 28, 1926, was not and is not an association taxable as a corporation within the meaning of Section 901 (a) (2) of the Revenue Act of 1938 and Section 3797 (a) (3) of the Internal Revenue Code. [160]

2. In concluding that plaintiff is entitled to recover costs against the defendant;

3. In that the findings of fact do not support the conclusions of law;

4. In that the findings of fact do not support the judgment;

5. In failing to make a finding that the trust in question, if not taxable as an association, was taxable for the year 1938 as a trust on its undistributed income;

6. In concluding that plaintiff is entitled to judgment against defendant, and in entering judgment for defendant and in not entering judgment for plaintiff.

Dated: February 27, 1946.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ W. E. LICKING,
Assistant United States Attorney.
Attorneys for Defendant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 27, 1946. [161]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The defendant having taken an appeal from the judgment made and entered herein on September 19, 1945, to the United States Circuit Court of Appeals for the Ninth Circuit, hereby designates the following parts of the record and proceedings for inclusion in the record on appeal:

1. Complaint;
2. Answer;
3. Amended answer;
4. Stipulation of facts;
5. Findings of fact and conclusions of law;
6. Notice;
7. Judgment for refund of taxes; [164]
8. Notice of entry of judgment;
9. Notice of appeal;
10. Statement of points on which appellant intends to rely on appeal;
11. Designation of record;
12. Transcript of proceedings;
13. Order of December 17, 1945, extending time for filing record on appeal and docketing the action.

Dated: February 27, 1946.

/s/ FRANK J. HENNESSY,
United States Attorney.

/s/ W. E. LICKING,
Assistant United States Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 27, 1946. [165]

[Title of District Court and Cause.]

PLAINTIFF'S ADDITIONS TO DESIGNATION OF RECORD ON APPEAL

The defendant having taken appeal from the judgment made and entered herein on September 19, 1945, to the United States Circuit Court of Appeals for the Ninth Circuit, and having designated certain parts of the record and proceedings for inclusion in the record on appeal, plaintiff hereby designates the following for inclusion in said record on appeal:

1. Reporter's transcript of testimony of R. C. Hinderliter, Line 9, Page 5, to Line 2, Page 13;

Reporter's Transcript, Lines 2 to 5, Page 3.

Dated: March 11, 1946.

LLOYD G. RAINEY,
J. EVERETT BLUM and
PAUL C. JONES,

By /s/ J. EVERETT BLUM,
Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed March 12, 1946. [166]

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 23580-R

HOMECREST TRACT, BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, TRUSTEE,
Plaintiff and Appellee,

vs.

UNITED STATES OF AMERICA,
Defendant and Appellant.

ORDER EXTENDING TIME FOR FILING RECORDS AND DOCKETING CAUSE

Upon application of Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, and good cause appearing therefor, It Is Hereby Ordered that the time for the above named defendant and appellant, in action No. 23580-R in the Southern Division of the United States District Court for the Northern District of California, to file the records on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended to and including April 15, 1946.

Dated: March 15, 1946.

FRANCIS A. GARRECHT,

Senior Circuit Court Judge.

A true copy. Attest: March 15, 1946.

/s/ PAUL P. O'BRIEN,

Clerk.

[Endorsed]: Filed March 15, 1946. [168]

[Title of Circuit Court of Appeals and Cause.]

ORDER EXTENDING TIME FOR FILING RECORDS AND DOCKETING CAUSE

Upon application of Frank J. Hennessy, United States Attorney, and William E. Licking, Assistant United States Attorney, and good cause appearing therefor, It Is Hereby Ordered that the time for the above named defendant and appellant, in action No. 23580-R in the Southern Division of the United States District Court for the Northern District of California, to file the records on appeal and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended to and including May 15, 1946.